

# Directed Verdict and Judgment Notwithstanding Verdict

ROBERT M. HUNTER\*

In a large percentage of personal injury and wrongful death actions, the hurdle which is feared most by the plaintiff's attorney is that raised by a motion for a directed verdict.<sup>1</sup> Statistics are not available to indicate the percentage of such actions which have been terminated by a directed verdict. In cases against municipalities the figure would probably be larger than for actions against other types of defendants.<sup>2</sup> While experienced trial lawyers are fully aware of the possibility of a directed verdict, it seems to be the fact that many lawyers are not and often so present their cases as to make a directed verdict almost inevitable.

The motion is frequently made by defendant's counsel at the conclusion of the opening statement for the plaintiff. As one listens to the short, carelessly phrased statement sometimes made by an inexperienced lawyer it seems that he must not know that it is possible that his client will lose the case without an opportunity to put on a witness. Surely, few experiences could be more embarrassing to a lawyer than that of having his opening statement made the basis for direction of a verdict against his client. It has happened many times.<sup>3</sup>

The motion at the conclusion of the opening statement may be either for a directed verdict or for dismissal of the action.<sup>4</sup> It is prob-

---

\* Professor of Law, College of Law, The Ohio State University.

<sup>1</sup> Synonymous terms are "instructed verdict", *Steel Materials Corp. v. Stern*, 82 Ohio App. 89, 77 N.E. 2d 272 (1947), and "peremptory instruction", Farley, *Instructions to Juries—Their Role in the Judicial Process*, 52 *YALE L. J.* 194, 218 (1932).

<sup>2</sup> The course in Ohio Court Practice is required of all third-year students at The Ohio State University College of Law. Part of the course consists of the trial of a case based upon facts found in a current motion picture. Prior to participating in the trial of this Practice Court case, each student is required to make a written report of an actual trial in the common pleas court. From these reports and from oral statements of the students as to their difficulties resulting from settlements and directed verdicts, a fairly accurate picture of the civil jury litigation in Franklin County Common Pleas Court is being acquired.

<sup>3</sup> *E.g.*, *Gross v. Campbell*, 118 Ohio St. 285, 160 N.E. 852 (1928); *Fini v. Perry*, 119 Ohio St. 367, 164 N.E. 358 (1928); *Cleveland Ry. Co. v. Barragate*, 125 Ohio St. 190, 180 N.E. 694 (1932); *Cervone v. Youngstown*, 18 Ohio L. Abs. 109 (1934); *Cheney v. Garrett*, 50 Ohio L. Abs. 150, 76 N.E. 2d 96 (1947); and cases cited in 39 *OHIO JUR.*, Trial, § 225 *et seq.*, 12 *PAGE'S OHIO DIG.*, Trial, 105.1.

<sup>4</sup> 39 *OHIO JUR.* 883; *Cornell v. Morrison*, 87 Ohio St. 215, 100 N.E. 817 (1912); 64 *C.J.*, Trial, § 391 (1933).

able that a court would be somewhat more reluctant to direct a verdict, thus laying the basis for a judgment on the merits. A dismissal of the action would not preclude the filing of another petition if the statute of limitations did not prevent it. Defendant's counsel would naturally prefer a directed verdict. However, he might be satisfied with a dismissal.

If the opening statement affirmatively shows that the action is based upon a contract which is against policy, or illegal for any reason, or that the statute of limitations has barred the claim, either a directed verdict or a dismissal may be expected.<sup>5</sup> Even in such cases an opportunity should be given plaintiff's counsel to modify or explain his statement before defendant's motion will be granted.<sup>6</sup> *A fortiori*, when the motion is predicated upon a mere omission from the statement, opportunity should be given to supply the lacking element.<sup>7</sup>

The disagreement which has existed for the past century as to the test to be applied in directing a verdict would seem to have no application when the motion is made following the opening statement. If counsel states that evidence will be produced to substantiate his client's claims as to each material issue, there is no occasion for raising a question as to the adequacy of the statement.<sup>8</sup>

If the defendant's motion following the opening statement is overruled, he has the choice of resting upon that ruling or proceeding with the trial. If the trial proceeds, the action of the court in overruling the motion should not be assignable as error in the event of an appeal following final judgment.<sup>9</sup> Any review of the proceedings on a motion for a new trial or on appeal should take into account the evidence actually introduced rather than counsel's statement as to the evidence which is expected to be produced. This would seem to follow *a fortiori* from the rule which has been adopted in connection with the overruling of the motion following the plaintiff's evidence.<sup>10</sup>

At the conclusion of the plaintiff's evidence, he is, of course, no more entitled to a directed verdict than he would have been prior to the presentation of his evidence. The defendant is entitled to his day in court. This means an opportunity to meet the evidence

---

<sup>5</sup> See Note, *Direction of Verdict on Opening Statement of Counsel*, 129 A.L.R. 557; *Gross v. Campbell*, 118 Ohio St. 285, 160 N.E. 852 (1928); *Oscanyan v. Winchester Repeating Arms Co.*, 103 U.S. 261 (1881); *Wrightson v. Dougherty*, 5 Cal. 2d 257, 54 P. 2d 13 (1936).

<sup>6</sup> *Pocley v. Pierrot*, 17 Ohio App. 175 (1922); *Cornell v. Morrison*, 87 Ohio St. 215, 100 N.E. 817 (1912).

<sup>7</sup> 39 OHIO JUR., Trial, § 228 and cases cited.

<sup>8</sup> 39 OHIO JUR., Trial, § 226.

<sup>9</sup> 9 WIGMORE, EVIDENCE 315 (3rd Ed. 1940).

<sup>10</sup> See note 40, *infra*.

against him by presenting evidence of his own. However, the defendant may be entitled to a directed verdict, and at this point, for the first time it becomes necessary for the court to choose among the several criteria which have been applied by various courts at various times. For simplicity, these may be called "the scintilla rule", "the reasonable mind's test", and "the new trial test".

Under the "scintilla rule," if there is any evidence whatever, even a mere scintilla, in support of each essential allegation of plaintiff's statement of claims, declaration or petition, the court should not direct a verdict against him.<sup>11</sup> This rule was followed in England from the first case in which a verdict was directed for defendant, probably in 1725,<sup>12</sup> until the rule was repudiated in 1857.<sup>13</sup>

In this country, the scintilla rule was accepted and applied in many jurisdictions.<sup>14</sup> In some states the period of its acceptance was much longer than in others. The United States Supreme Court at first applied this rule<sup>15</sup> and continued to do so until 1857, the year of its repudiation in England. In 1872 the supreme court followed the lead of the English courts and ceased to apply the scintilla rule.<sup>17</sup> The New York Court of Appeals in 1874<sup>18</sup> and the Pennsylvania Supreme Court in 1879,<sup>19</sup> likewise refused to continue to recognize the rule.

The Ohio Supreme Court was among the last of the American courts to abandon the scintilla rule.<sup>20</sup> It had been applied at least as early as 1856,<sup>21</sup> the year before that in which the United States Supreme Court last gave it expression,<sup>22</sup> and the year it was repudiated in England.<sup>23</sup> For more than seventy-five years, the Ohio Supreme Court continued to give effect to the rule.

In a case decided in 1925,<sup>24</sup> a minority of the court expressed

<sup>11</sup> 39 OHIO JUR., Trial, 793, 868.

<sup>12</sup> *Syderbottom v. Smith*, 1 Stranges 649, 93 Eng. Rep. 759. See Smith, *The Power of the Judge to Direct a Verdict: Section 457a of the New York Civil Practice Act*, 24 COL. L. REV. 111 (1924); Blume, *Origin and Development of the Directed Verdict*, 48 MICH L. REV. 555 (1950).

<sup>13</sup> *Toomey v. London Ry. Co.*, 3 C.B. (N.S.) 146, 140 Eng. Rep. 694. See Smith *op. cit. supra* note at 114.

<sup>14</sup> 53 AM. JUR., Trial, 285.

<sup>15</sup> *Greenleaf v. Birth*, 9 Pet. (34 U.S.) 292, at 299 (1835).

<sup>16</sup> *Richardson v. City of Breton*, 11 How. (52 U.S.) 361 (1857).

<sup>17</sup> *Improvement Co. v. Munson*, 14 Wall. (81 U.S.) 442 (1871).

<sup>18</sup> *Baulec v. RR. Co.*, 59 N.Y. 356 (1874).

<sup>19</sup> *Hyatt v. Johnson*, 91 Pa. St. 196 (1879).

<sup>20</sup> *Hamden Lodge v. Gas Co.*, 127 Ohio St. 469, 475, 189 N.E. 246 (1934).

<sup>21</sup> *Ellis & Morton v. Ohio Life Ins. & Tr. Co.*, 4 Ohio St. 628 (1855).

<sup>22</sup> *Supra* note 16.

<sup>23</sup> *Supra* note 13.

<sup>24</sup> *Cleveland-Akron Rag Co. v. Jaite*, 112 Ohio St. 506, 514, 148 N.E. 82 (1925).

disapproval of the rule but could not muster the necessary votes to commit the court to its repudiation. Three years later the following language was used in the syllabus of a case: "When the proof of the essential facts put in issue and the reasonable inferences deducible therefrom are such that the jury, as fairminded men, should reasonably arrive at but one conclusion, it is the duty of the trial court to direct a verdict in favor of the party which such proof sustains."<sup>25</sup>

In the same volume of reports, the syllabus of another case contained similar language.<sup>26</sup> However, it was six years later before the court explicitly repudiated the scintilla rule. In *Hamden Lodge v. Ohio Fuel Gas Co.*<sup>27</sup> the syllabus contains the following language:

1. The term 'scintilla', when used to designate a rule of trial procedure, is confusing and misleading and should be abandoned.

2. The so-called 'scintilla rule' requiring a trial judge to submit a case to the jury if there is any evidence, however slight, tending to support each material issue, no longer obtains in Ohio. (Second and third paragraphs of the syllabus in *Ellis & Morton v. Ohio Life Insurance & Trust Co.*, 4 Ohio St. 628 and the case of *Clark v. McFarland*, 99 Ohio St. 100 overruled.)

3. Upon motion to direct a verdict the party against whom the motion is made is entitled to have the evidence construed most strongly in his favor. But if upon any essential issue after giving the evidence such favorable construction, reasonable minds can come to but one conclusion and that conclusion is adverse to such party, the judge should direct a verdict against him.

4. Where from the evidence reasonable minds reach different conclusions upon any question of fact, such question of fact is for the jury. The test is not whether the trial judge should set aside a verdict on the weight of the evidence.

From the last sentence of this quotation it is clear that the Ohio Supreme Court deliberately rejected the rule which the United States Supreme Court adopted when it abandoned the scintilla rule.

In his opinion in *Pleasant v. Fant*,<sup>28</sup> Mr. Justice Miller asks: "Must the court go through the idle ceremony in such a case of submitting to the jury the testimony on which plaintiff relies, when it is clear to the judicial mind that if the jury should find a verdict

---

<sup>25</sup> *Jacob Laub Baking Co. v. Middleton*, 118 Ohio St. 106, 160 N.E. 629 (1928).

<sup>26</sup> *Painesville Utopia Theatre Co. v. Lautermilch*, 118 Ohio St. 167, 160 N.E. 633 (1928).

<sup>27</sup> *Supra* note 20.

<sup>28</sup> 22 Wall. (39 U.S.) 116, 122 (1874).

in favor of plaintiff that verdict would be set aside and a new trial had?"

The negative answer to this question was consistently given by the supreme court in cases involving direction of verdicts until 1941.<sup>29</sup> In that year Mr. Justice Black wrote the opinion for the unanimous court in *Berry v. United States*.<sup>30</sup> In it he said, "There was evidence from which a jury could reach the conclusion that petitioner was totally and permanently disabled. That was enough." In *De Zon v. American President Lines Ltd.*<sup>31</sup> and in *Galloway v. United States*,<sup>32</sup> Mr. Justice Black dissented because the majority of the court applied a test for directing a verdict which he believed had the effect of depriving plaintiff of his constitutional right to jury trial.<sup>33</sup> Justices Douglas and Murphy joined him in his dissents in both cases.

In *Wilkinson v. McCarthy*,<sup>34</sup> Mr. Justice Black wrote the opinion of the Court and in it he said, "And peremptory instructions should not be given in negligence cases 'when the facts are in dispute, and the evidence in relation to them is that from which fair-minded men may draw different inferences,' *Washington & G. R. Co. v. McDade*, 135 U.S. 554, 572. Such has ever since been the established rule for trial and appellate courts."<sup>35</sup>

In *Brady v. Southern Ry. Co.*,<sup>36</sup> Mr. Justice Reed wrote the majority opinion and said: "When evidence is such that without weighing the credibility of the witnesses, there can be but one reasonable conclusion as to the verdict, the court should determine the proceeding by non-suit, directed verdict or otherwise in accordance with the applicable practice without submission to the jury, or by judgment notwithstanding the verdict. By such direction of the trial, the result is saved from the mischance of speculation over legally unfounded claims."<sup>37</sup>

While this language is similar to that used by the courts which apply the reasonable mind's test, several of the cases cited as authorities are those which approved the new trial test. Mr. Justice Black wrote a dissenting opinion and was joined by Justices

---

<sup>29</sup> See Blume *op. cit. supra* note 12.

<sup>30</sup> 312 U.S. 450 (1940).

<sup>31</sup> 318 U.S. 660 (1943).

<sup>32</sup> 319 U.S. 372 (1943).

<sup>33</sup> The related problem of the constitutionality of a statute forbidding the direction of a verdict or nonsuit is dealt with in an annotation in 29 A.L.R. 1287; the case which is annotated is *Thoe v. C.M. & St. P.R. Co.*, 181 Wis. 456, 195 N.W. 407 (1923); see also *People v. McCurphy*, 249 Mich. 147, 228 N.W. 723 (1930).

<sup>34</sup> 336 U.S. 53 (1949).

<sup>35</sup> *Id.* p. 62.

<sup>36</sup> 320 U.S. 476 (1943).

<sup>37</sup> *Id.* p. 479.

Douglas, Murphy and Rutledge.

It would seem that the United States Supreme Court has on occasion abandoned the new trial test and in recent cases has wavered between acceptance of the reasonable mind's test and return to the scintilla rule.

When defendant moves for a directed verdict at the conclusion of plaintiff's evidence and the motion is overruled, defendant must choose between standing upon the court's ruling and presenting his own evidence. If he takes the latter course he thereby waives the error, if any, in the court's ruling on his motion. In one case in which the Ohio Supreme Court dealt with this question, it used unfortunate language. It said, "In our judgment the defendant lost the benefit of its motion for a verdict by introducing its evidence without afterwards renewing the motion. In other words, proceeding with the defense waived the motion, unless it was afterward renewed".<sup>38</sup> In a later portion of the opinion, the Court said: "Giving due consideration to the reasons which underlie the various decisions, we are disposed to hold, that the exception to the motion for a verdict at close of plaintiff's evidence, is waived by the defendant by introducing his defense, unless the motion be renewed at the end of the whole evidence, and if so renewed it challenges the sufficiency of plaintiff's evidence taken in connection with the facts which appear in the evidence introduced by the defendant".<sup>39</sup> This would seem to mean that the second motion will be considered on its own merits regardless of the state of the evidence at the time of the first motion. In a subsequent case, the Court clarified this situation:

"When a motion of a defendant for a directed verdict is made at the conclusion of plaintiff's evidence and overruled, the defendant has an election either to stand on his exception to the ruling or to proceed with his defense; and if he accepts the ruling, however erroneous it may be, and proceeds with his defense, introducing evidence on his own behalf, he thereby waives his right to rely on the denial of his original motion.

The renewal of defendant's motion to direct a verdict at the close of all the evidence challenges, not the sufficiency of the evidence that was alone before the court and jury at the time the original motion was made, but the evidence and the state of the record as it exists at the conclusion of all the evidence."<sup>40</sup>

In a per curiam opinion in a subsequent case, the supreme court said: "Unless a motion for a directed verdict is renewed at the close of all the evidence, error cannot be predicated upon the

---

<sup>38</sup> Cincinnati Traction Co. v. Durck, 78 Ohio St. 243, 249, 85 N.E. 38 (1908).

<sup>39</sup> *Id.* p. 255.

<sup>40</sup> Halkias v. Wilkoff Co., 141 Ohio St. 139, 47 N.E. 2d 199 (1943).

refusal to direct a verdict."<sup>41</sup> However, this would not seem to raise a serious question as to the continued validity of the rule stated in the syllabus of *Halkias v. Wilkoff Co.*

At the conclusion of all the evidence, if each party moves for a directed verdict, complications may arise. If one party's motion is ruled upon before the other's is made, each of the motions will rest upon its own merits and the reasonable mind's test will determine whether either should be sustained or overruled. In some cases a motion is made by the adverse party before a prior motion has been decided and neither party requests that the case go to the jury if his motion is overruled. They impliedly waive a jury and the court is warranted in directing a verdict in favor of the party who would have been entitled to judgment if a jury had been waived at the commencement of the trial.<sup>42</sup>

However, either party may qualify his motion with a request that if it is overruled, the case shall be submitted to the jury.<sup>43</sup> Moreover, if the court rules on the motions in inverse order and sustains the second motion before overruling the first, the party who moved first has the right to withdraw his motion and request submission to the jury.<sup>44</sup> In either of these situations, since the waiver of the jury is a mere implication, any action of either party which is clearly inconsistent with such implication should be sufficient to prevent it. If either party requests that written instructions or interrogatories be submitted to the jury, he should not be held to have waived a jury from the mere fact that both parties have requested a directed verdict.

There is a substantial difference between the amount of evidence essential to the direction of a verdict under the reasonable mind's test and that necessary to uphold a determination by the court when a jury has been waived.<sup>45</sup> Counsel, aware of this difference, would not ordinarily give up in behalf of his client the more favorable rule when it may be preserved by the simple act of qualifying the motion for directed verdict.

It seems to be a matter of some doubt in Ohio as to whether a party, against whom a motion for directed verdict has been made, should be permitted to reopen his case and introduce further

---

<sup>41</sup> *McKellips v. Industrial Commission*, 145 Ohio St. 79, 80, 60 N.E. 2d 667 (1945).

<sup>42</sup> *First National Bank v. Hayes & Sons*, 64 Ohio St. 100, 59 N.E. 893 (1901). See annotations 18 A.L.R. 1433 (1922); 108 A.L.R. 1315 (1937).

<sup>43</sup> *Steelmaterials Corp. v. Stern*, 82 Ohio App. 89, 77 N.E. 2d 272 (1947). See note 9 OHIO SR. L.J. 707 (1948) also Gorman, *Problems in Trial Procedure*, 12 Ohio Bar 475, 478 (1939).

<sup>44</sup> *Nead v. Hershman*, 103 Ohio St. 12, 132 N.E. 19 (1921).

<sup>45</sup> In the latter situation the test is whether the court's determination is against the manifest weight of the evidence.

testimony. In one court of appeals case,<sup>46</sup> it was held to be error to refuse plaintiff the right to reopen. In another court of appeals case, judgment was affirmed after the trial court had refused to permit plaintiff to reopen his case. The record in this case was certified to the supreme court because of the conflict between the judgment and that in the case of *Siegal v. Portage Yellow Cab Co.*<sup>47</sup> The supreme court<sup>48</sup> disregarded the question which was involved in the conflict and disposed of the case on another ground. In a third case decided by still another court of appeals, it was held that the trial court had not abused its discretion in refusing the plaintiff's request to reopen when the request was not accompanied by a tender of an appropriate amendment to the petition to support the reception of proof.<sup>49</sup>

#### JUDGMENT NOTWITHSTANDING VERDICT

Prior to 1935 motion for the judgment notwithstanding verdict in Ohio was limited to a consideration of the pleadings.<sup>50</sup> In that year General Code, Section 11601 was amended to permit such a judgment on the pleadings or the evidence.<sup>51</sup> The effect of the amendment was to allow a court to correct the error made in improperly overruling a motion for directed verdict or to take appropriate action if no such motion had been made. The criterion to be applied in granting judgment under General Code, Section 11601 is exactly the same as that in directing a verdict, *i.e.*, if reasonable minds can reach but one conclusion. The section itself precludes the new trial test from being applied by providing that "no judgment shall be rendered by the Court on the ground that the verdict is against the weight of the evidence."

In 1947 a new provision was added to the General Code,<sup>52</sup> Section 11599-1 provides that: "No motion for judgment notwithstanding the verdict may be filed after a judgment in conformity to the verdict shall have been approved by the Court in writing and filed with the clerk for journalization." It seems clear enough that this section makes it mandatory that the party against whom

---

<sup>46</sup> *Siegal v. Yellow Cab Co.*, 23 Ohio App. 438, 155 N.E. 145 (1926).

<sup>47</sup> *Ibid.*

<sup>48</sup> *Martin Jr. v. Heintz*, 126 Ohio St. 227, 184 N.E. 852 (1933).

<sup>49</sup> *Whisman v. Willis*, 76 Ohio App. 150, 62 N.E. 2d 296 (1945).

<sup>50</sup> *Yackee v. Napoleon*, 135 Ohio St. 344, 359, 21 N.E. 2d 111 (1939).

<sup>51</sup> 116 Ohio Laws 249, effective Sept. 2, 1935. The section now reads as follows: "When, upon the statements in the pleadings or upon the evidence received upon the trial, one party is entitled by law to judgment in his favor, judgment shall be rendered by the court, although a verdict has been found against such party and whether or not motion to direct a verdict may have been made or overruled, but no judgment shall be rendered by the court on the ground that the verdict is against the weight of the evidence."

<sup>52</sup> 122 Ohio Laws 686, effective Sept. 27, 1947.



the verdict is rendered must act expeditiously in filing a motion for judgment notwithstanding verdict under General Code, Section 11601.

It is not so clear whether General Code, Section 11599-1 applies to the type of judgment notwithstanding verdict provided for by General Code, Section 11420-18: "When a special finding of facts is inconsistent with the general verdict, the former shall control the latter, and the court may give judgment accordingly." The word "may" has been construed to mean "shall" and the duty to render judgment on the special findings is mandatory.<sup>53</sup> The judgment on the special findings is in fact entered "notwithstanding the verdict" and the motion is frequently referred to as a "motion for judgment notwithstanding the verdict."<sup>54</sup> It would not be a strained construction to hold that General Code, Section 11599-1 applies to both types of motion for judgment notwithstanding verdict. However, it is conceivable that the courts may limit its application to the type of motion contemplated by General Code, Section 11601 and hold it inapplicable to the judgment on special findings under General Code, Section 11420-18.

On appeal when the court of appeals decides that the trial court committed error in overruling a motion for directed verdict or for judgment notwithstanding verdict, it should render the judgment which the lower court should have rendered rather than remanding the case for a new trial or for rendition of judgment.<sup>55</sup>

---

<sup>53</sup> *Central Gas Co. v. Hope Oil Co.*, 113 Ohio St. 354, 364, 149 N.E. 386 (1925).

<sup>54</sup> *Id.* p. 358; *Daly v. Savage*, 27 Ohio App. 133, 160 N.E. 881 (1927); *Spillman v. Baltimore & Ohio S.W.R.R. Co.*, 3 Ohio L. Rep. 544 (1906); *Davis v. Turner*, 69 Ohio St. 101, 68 N.E. 819 (1903).

<sup>55</sup> *Majoros v. Cleveland Interurban Rd. Co.*, 127 Ohio St. 255, 187 N.E. 857 (1933).