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PRACTICE AND PROCEDURE - DIRECTION OF VERDICT - SCINTILLA RULE

PRACTICE AND PROCEDURE — DIRECTION OF VERDICT — SCINTILLA RULE — In an action to recover from the defendant gas company damage to the plaintiff's building caused by a gas explosion resulting from a defective pipe, the plaintiff's only evidence to prove the defendant's duty to repair it was that the pipe was used exclusively for the conveyance of the defendant's gas, and that the meters to which the pipe was connected were owned and controlled by the defendant. The trial court, by virtue of the scintilla rule, submitted the case to the jury which rendered a verdict for the plaintiff. *Held*, the scintilla rule no longer prevails in Ohio, and the trial court should have directed a verdict for the defendant. *Hamden Lodge v. The Ohio Fuel Gas Co.*, 127 Ohio St. 469, 189 N. E. 246 (1934).

The scintilla rule, or the rule that the court will not direct a verdict against a party if he has introduced any evidence, no matter how slight, which tends to prove or disprove the issue,[1] has been repudiated in most States.[2] It is still upheld in terms by the courts in some jurisdictions,[3] but these decisions are to a large

[1] 2 THOMPSON, TRIALS, 2d ed., sec. 2246 (1912).

[2] 5 WIGMORE, EVIDENCE, sec. 2494 (1923); Dunnington v. Syfers, 157 Ind. 458, 62 N. E. 29 (1901); Smith v. Morgan, 214 Iowa 555, 240 N. W. 257 (1932); Hillyer v. Dickinson, 154 Mass. 502, 28 N. E. 905 (1891); Linkauf v. Lombard, 137 N. Y. 417, 33 N. E. 472 (1893). See 64 C. J. 309 for further authorities.

[3] Biggs v. Higbee, 224 Ala. 121, 138 So. 819 (1931); Bergman v. Solomon, 143 Ky. 581, 136 S. W. 1010 (1911).

degree qualified by liberal definitions of the word "scintilla." [4] Some cases, however, seem to advance the substance of the rule without designating it as such.[5] In Ohio the rule has long been a subject of controversy.[6] Prior to the decision in the principal case it was an object of adverse criticism by both bench and bar.[7] The rule adopted by the Ohio Supreme Court in the instant case is that the court should direct a verdict against a party if, after the evidence is given the most favorable interpretation in his favor, the court finds that upon any material issue only an adverse conclusion can reasonably be drawn.[8] This rule seems to be substantially in accord with that in other jurisdictions.[9] The Ohio court, however, expressly refuses to adopt the rule followed in the federal [10] and some state courts,[11] that the court will direct a verdict when it would be necessary to set aside a contrary one as opposed to the weight of the evidence.[12] The power to set aside a verdict lies within the discretion of the court, whose decision will not be reviewed unless this discretion is abused.[13] The rule in Ohio seems to be that a verdict should not be set aside because of mere difference of opinion between the judge and the jury as to the weight of the testimony, but only when the verdict is unsupported by, or is against the weight of, the evidence so that it is

[4] Duff v. May, 245 Ky. 709, 54 S. W. (2d) 4 (1932); Dutton v. Atlantic Coast Line Ry., 104 S. C. 16, 88 S. E. 263 (1916).

[5] Starr v. Greenwood, (Ga. App. 1934) 173 S. E. 243; Baltimore City v. Carroll, 128 Md. 68, 96 Atl. 1076 (1916); St. Louis & S. F. Ry. v. Akard, 60 Okla. 4, 159 Pac. 344 (1916); Souza v. United Electric Ry., 49 R. I. 430, 143 Atl. 780 (1928).

[6] Hamden Lodge v. Ohio Fuel Gas Co., 127 Ohio St. 469, 189 N. E. 246 (1934); Dana, "The Scintilla Rule in Ohio," 7 UNIV. CINN. L. REV. 237 (1933).

[7] Cleveland-Akron Bag Co. v. Jaite, 112 Ohio St. 506, 148 N. E. 82 (1925). The Ohio State Bar Association in 1898 resolved that the "scintilla rule" should be abolished by statute. Dana, "The Scintilla Rule in Ohio," 7 UNIV. CINN. L. REV. 237 (1933); 18 MICH. L. REV. 46 (1919).

[8] Hamden Lodge v. Ohio Fuel Gas Co., 127 Ohio St. 469, 189 N. E. 246 (1934).

The court in the instant case also approved the second paragraph of the syllabus in Laub Baking Co. v. Middleton, 118 Ohio St. 106, 160 N. E. 629 (1928): "When the proof of the essential facts put in issue and the reasonable inferences deducible therefrom are such that the jury, as fair minded 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."

[9] Donovan v. Connecticut Co., 86 Conn. 82, 84 Atl. 288 (1912); Miles v. Long, 342 Ill. 589, 174 N. E. 836 (1931); Gasco v. Tracas, 85 Ind. App. 591, 155 N. E. 179 (1927); Hyatt v. Johnston, 91 Pa. 196 (1879). See 5 WIGMORE, EVIDENCE, sec. 2494 (1923).

[10] Pennsylvania Ry. v. Chamberlain, 288 U. S. 333, 53 Sup. Ct. 391 (1933).

[11] Ill. Central Ry. v. Bailey, 222 Ill. 480, 78 N. E. 833 (1906); Isaacs v. Bruce, (Iowa 1934) 254 N. W. 57; Baxter v. Brandenburg, 137 Minn. 259, 163 N. W. 516 (1917); Johnson v. Herring, 89 Mont. 420, 300 Pac. 535 (1931); Read v. Automobile Inv. Co., 167 Okla. 184, 29 Pac. (2d) 62 (1933).

[12] Hamden Lodge v. Ohio Fuel Gas Co., 127 Ohio St. 469, 189 N. E. 246 (1934).

[13] Beatty v. Hatcher, 13 Ohio St. 115 (1861).

clear that the jury has erred,[14] or when the verdict is palpably against the evidence or the "decided" weight of it.[15] The federal courts have stated the rule in various forms, some holding that a new trial should not be granted unless the verdict is manifestly and palpably against the evidence,[16] or contrary to the "decided or overwhelming" weight of the evidence,[17] or unless it clearly appears that the jury must have fallen into some important mistake, departed from some rule of law, or made plainly unwarranted deductions from the evidence.[18] State courts vary widely at least in the phraseology of their rules, some holding that a verdict should be set aside when it so clearly appears that it is against the weight of the evidence as to give rise to the inference that it is the result of mistake, passion, prejudice or partiality,[19] some holding that the verdict should be set aside when the court is convinced that it is wrong and unjust,[20] or shocking to judicial conscience,[21] or wrong to a moral certainty,[22] while others hold that a new trial should be granted if the evidence preponderates against the verdict,[23] or if the court believes that the verdict should have been for the other party.[24] Although an exact comparison of the rules for setting aside and directing verdicts is made very difficult by the confusing variety in the phraseology used in stating them, yet it is certain that the abrogation of the "scintilla rule" in Ohio will enable trial courts to dispose finally of many cases without resort to the dilatory and expensive remedy of the new trial.

C. P. H.

[14] McGatrick v. Wason, 4 Ohio St. 566 (1855); Dean v. King, 22 Ohio St. 118 (1871).

[15] Webb v. Protection Ins. Co., 6 Ohio (6 Hammond) 456 (1834).

[16] Weed v. Lyons Petroleum Co., (D. C. Del. 1923) 294 Fed. 725, affirmed in Lyons Petroleum Co. v. Weed, (C. C. A. 3d, 1924) 300 Fed. 1005; Dunlap v. United States, (D. C. Idaho 1930) 43 F. (2d) 999, appeal dismissed in United States v. Dunlap, (C. C. A. 9th, 1930) 45 F. (2d) 1021.

[17] Felton v. Spiro, (C. C. A. 6th, 1897) 78 Fed. 576.

[18] Fuller v. Fletcher, (C. C. R. I. 1881) 6 Fed. 128.

[19] Adams v. Willetts, (Sup. Ct. N. J. 1925) 128 Atl. 855; Levanthal v. Home Ins. Co., (Sup. Ct. 1917) 165 N. Y. S. 323.

[20] Jena Lumber Co. v. Marlowe Lumber Co., 208 Ala. 385, 94 So. 492 (1922).

[21] Bradican v. Scranton Ry., 260 Pa. 555, 103 Atl. 1013 (1918).

[22] Harmon v. Cumberland Power & Light Co., 124 Me. 418, 130 Atl. 273 (1925).

[23] Babik v. Ainley, 172 Cal. 147, 155 Pac. 631 (1916).

[24] Hennessey Oil & Gas Co. v. Neely, 62 Okla. 101, 162 Pac. 214 (1917).