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Civil Procedure - Trial Practice - Consecutive Motions for Directed Verdict

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CIVIL PROCEDURE—TRIAL PRACTICE—CONSECUTIVE MOTIONS FOR DIRECTED VERDICT—Plaintiff brought an action to recover arrearages in rent. At the conclusion of the evidence, plaintiff and then defendant made motions for a directed verdict. The trial court held that where both parties make a motion to direct a verdict, it is the duty of the court to decide the case on its merits and accordingly found in favor of the plaintiff. Defendant immediately moved to amend his motion to attach a reservation which

would have the issues submitted to a jury, but the amendment was disallowed. The appellate court reversed the judgment, finding prejudice to defendant since the trial court ruled without having passed on either motion and without allowing defendant reasonable opportunity to request submission of the facts to the jury. On appeal, *held,* affirmed, with cause remanded to the trial court, one judge dissenting. Where at the close of all the evidence presented each party moves for a directed verdict, the parties do not clothe the court with the functions of a jury, but merely request rulings on separate questions of law unless there is an express waiver of jury trial by both parties. *Carter-Jones Lumber Co. v. Eblen,* 167 Ohio St. 189, 147 N.E. (2d) 486 (1958).

Consecutive motions for directed verdict[1] and their effect on the right to a jury trial have long plagued the courts.[2] A majority of the courts first adopted the view that where both parties move for a directed verdict without reserving the right to jury trial, they waive that right and the trial court is then to decide all questions of law and fact.[3] Some courts adopting this rule felt the parties admitted there was no dispute as to the facts[4] and thus there remained only questions of law to be decided. Other courts, while recognizing that it does not necessarily follow there is no dispute as to the facts where both parties move for directed verdicts, have adopted this rule as a rule of practice.[5] However, the rule of waiver of jury trial is not applied in these jurisdictions when the parties expressly reserve the right to take disputed issues to the jury. Further, since trial by jury is a constitutional right the courts will generally indulge in every reasonable presumption against waiver,[6] and some courts have held that where the moving party simultaneously submits requested instructions to the jury he thereby reserves the right to take disputed issues to the jury.[7] A few courts adopting the waiver view have ruled that though both parties move for a directed verdict, the court of its own motion can send the case to the jury, even over the objection of counsel.[8]

Other courts, however, have attached no significance to consecutive mo-

1 Consecutive motions for directed verdict are where the second party presents his motion prior to the court's ruling on the motion of the first party so that the court has both motions before it for decision at the same time.

2 For a discussion of the early law in this area, see 18 A.L.R. 1433 (1922).

3 Graubart v. Posner, 188 Misc. 722, 68 N.Y.S. (2d) 910 (1947); Nielsen v. Warner, 66 S.D. 214, 281 N.W. 110 (1938); Atlas Realty v. Rowray, 51 Wyo. 318, 65 P. (2d) 1122 (1937); Aetna Ins. Co. v. Kennedy, 301 U.S. 389 (1937).

4 Aetna Ins. Co. v. Kennedy, note 3 supra.

5 Farm Machinery, Inc. v. Bry, (N.D. 1957) 82 N.W. (2d) 593; Foudy v. Daugherty, (Ind. App. 1947) 76 N.E. (2d) 268; Williams v. Corbett, 205 Ore. 69, 286 P. (2d) 115 (1955).

6 Burke Grain Co. v. St. Paul-Mercury Indemnity Co., (8th Cir. 1938) 94 F. (2d) 458; Aetna Ins. Co. v. Kennedy, note 3 supra.

7 Ford v. Connell, 69 Idaho 183, 204 P. (2d) 1019 (1949); Mellios v. Dines, 341 Mich. 175, 67 N.W. (2d) 68 (1954).

8 Granier v. Chagnon, 122 Mont. 327, 203 P. (2d) 982 (1949); Blakely v. First Nat. Bank, 151 Ore. 655, 51 P. (2d) 1034 (1935).

tions for directed verdict except to raise the legal sufficiency of the evidence to sustain a verdict.[9] The theory that where both parties move for a directed verdict no dispute as to the facts exists was attacked as unrealistic.[10] Moreover, it is not often that a party having the burden of proof establishes his claim as a matter of law.[11] In states adopting this view courts have nevertheless ruled that there is a waiver of jury trial where the parties expressly[12] or impliedly[13] agree there are no disputed issues.[14] It is also clear that where the evidence is insufficient as a matter of law the court must direct a verdict for the opposing party.[15] Rule 50(a) of the Federal Rules of Civil Procedure[16] has changed the rule in federal courts[17] in favor of the non-waiver view, and similar provisions have changed the law in several states[18] formerly following the rule of waiver. At the present time about half the states have adopted the non-waiver view either by decision[19] or by statute.[20]

[9] Cole v. Hartford Accident and Indemnity Co., 242 Iowa 416, 46 N.W. (2d) 811 (1951); Poole v. First Nat. Bank, 29 Tenn. App. 327, 196 S.W. (2d) 563 (1946). For a collection of early cases adopting this position, see 108 A.L.R. 1315 at 1325 (1937).

[10] See generally 9 GA. B.J. 212 (1946); 9 OHIO ST. L. J. 707 (1948); 27 MICH. L. REV. 719 (1929); 23 MICH. L. REV. 545 (1925).

[11] Cole v. Hartford Accident and Indemnity Co., note 9 supra.

[12] In re Coon's Estate, 154 Neb. 690, 48 N.W. (2d) 778 (1951); Kaeser v. Town of Starksboro, 116 Vt. 251, 73 A. (2d) 881 (1950).

[13] Hufstedler v. Sides, (Tex. App. 1942) 165 S.W. (2d) 1006; Greenville County v. Stover, 198 S.C. 240, 17 S.E. (2d) 535 (1941); Wells v. Lloyd, 6 Cal. (2d) 70, 56 P. (2d) 517 (1936).

[14] For a collection of early cases, see 108 A.L.R. 1315 at 1328 (1937).

[15] New England Mutual Life Ins. Co. v. Huckins, 127 Fla. 540, 173 S. 696 (1937); Greenville County v. Stover, 198 S.C. 240, 17 S.E. (2d) 535 (1941).

[16] 28 U.S.C. (1952) Rule 50(a): "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. . . ." ["The present Federal rule is changed to the extent that the formality of an express reservation of rights against waiver is no longer necessary." Notes of Advisory Committee on Rules.] See also N.Y. Civil Practice Act (Clevenger, 1958) §457(a)(2); Neb. Rev. Stat. (1943) §25-1315.01. But see Denver Equipment Co. v. Newell, 115 Colo. 23, 169 P. (2d) 174 (1946), to the effect that there may even be an implied waiver under rule 50(a).

[17] Starfred Properties, Inc. v. Ettinger, (2d Cir. 1943) 131 F. (2d) 575; Vandevander v. United States, (5th Cir. 1949) 172 F. (2d) 100.

[18] Karlin v. Stuyvesant Press, 146 N.Y.S. (2d) 294 (1955); In re Coon's Estate, note 12 supra; Goldenberg v. Village of Capitan, 55 N.M. 122, 227 P. (2d) 630 (1951); Robinson v. Lehnert, 71 Ariz. 454, 229 P. (2d) 708 (1951), but see Tucson v. O'Rielly Motor Co., 64 Ariz. 240, 168 P. (2d) 245 (1946).

[19] *Alabama:* Wilkes v. Stacy Williams Co., 235 Ala. 343, 179 S. 245 (1938); *California:* Wells v. Lloyd, note 13 supra; *Florida:* New England Mutual Life Ins. Co. v. Huckins, note 15 supra; *Georgia:* Yablon v. Metropolitan Life Ins. Co., 200 Ga. 693, 38 S.E. (2d) 534 (1946); *Iowa:* Cole v. Hartford Accident and Indemnity Co., note 9 supra; *Minnesota:* Lee v. Osmundson, 206 Minn. 487, 289 N.W. 63 (1939); *Ohio:* principal case; *South Carolina:* Greenville County v. Stover, note 15 supra; *Tennessee:* Poole v. First Nat. Bank, note 9 supra; *Texas:* Hufstedler v. Sides, note 13 supra; *Vermont:* Mason v. Sault, 93 Vt. 412, 108 A. 267 (1919); *West Virginia:* Canterberry v. Canterberry, 120 W. Va. 310, 197 S.E. 809 (1938).

[20] See note 18 supra for cases dealing with consecutive motions under statutory provisions similar to Federal Rule 50(a).

The court in the principal case was faced with a confusing line of Ohio authority regarding the effect of consecutive motions for a directed verdict. This state early adopted the rule of waiver of jury trial where such motions are made,[21] but subsequent decisions had engrafted a variety of exceptions on this rule in an attempt to do justice in each case.[22] The instant case expressly overruled the early Ohio view in the belief that it was more just to require from counsel an express waiver of the constitutional right to trial by jury where consecutive motions for directed verdict are made. The majority of the court thus recognized that stare decisis should not be blindly invoked in procedural matters where right and equity compel a change.[23] The Ohio court is to be commended for showing no reluctance to effect a change when it appeared one was needed. Under the former Ohio rule of waiver and its subsequent refinements both inexperienced and wary lawyers faced the trap illustrated by the principal case. The new rule adopted by the court, in eliminating the formality of an express reservation of the right to a jury trial, represents a more sensible approach to the problem presented in this situation.

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21 The rule of waiver was first established in Ohio in First Nat. Bank v. Hayes, 64 Ohio St. 100, 59 N.E. 893 (1901).

22 For a thorough review of the Ohio authority, see principal case at 491-492.

23 Davis v. Smith, (E.D. Pa. 1954) 126 F. Supp. 497; Woods v. Lancet, 303 N.Y. 349, 102 N.E. (2d) 691 (1951); Funk v. United States, 290 U.S. 371 at 383 (1933): "To concede this capacity for growth and change in the common law by drawing 'its inspiration from every fountain of justice,' and at the same time to say that the courts of this country are forever bound to perpetuate such of its rules as, by every reasonable test, are found to be neither wise nor just, because we have once adopted them as suited to our situation and institutions at a particular time, is to deny to the common law . . . 'a flexibility and capacity for growth and adaptation' which was 'the peculiar boast and excellence' of the system in the place of its origin."