JURY TRIAL NOT WAIVED BY SIMULTANEOUSLY PENDING MOTIONS FOR DIRECTED VERDICT

Carter-Jones Lumber Co. v. Eblen,
167 Ohio St. 189, 147 N.E.2d 486 (1958).

With this opinion the Ohio Supreme Court has cleared from the books a 57-year old rule which—together with a myriad of exceptions thereto—had posed a continuing threat to the unwary advocate. Originally propounded in *First National Bank v. Hayes & Sons*,[1] it provided that concurrently pending motions for directed verdict made by the parties at the close of the evidence clothed the court with the functions of the jury and that a directed verdict should not then be set aside except as against the weight of the evidence. A further proviso in the *Hayes* case indicated that all this happened only when the party whose motion was denied failed to request the case go to the jury on its facts. The when, where and how of making this request have since furnished grist for subsequent litigation of and exception to the rule.[2]

The present case aptly illustrates the sort of situation in which the rule has operated. During trial before the Akron Municipal Court after both the parties had rested, plaintiff moved for a directed verdict. Defendant renewed his motion for directed verdict made at the close of plaintiff's case. The court stated it would rule on both motions after an hour's recess for lunch; with the recess over and before the jury had been dismissed, the court stated it was deciding the case on its merits and found in favor of the plaintiff. Defendant immediately requested that the case go to the jury on its facts, and alternatively sought to withdraw his motion for directed verdict. The court ruled the request came too late and entered judgment. On appeal the Summit County Court of Appeals reversed the judgment on the ground that defendant was not afforded a reasonable opportunity to request submission of the facts to the jury. The case was taken to the Ohio Supreme Court upon allowance of a motion to certify, and the appellate court's judgment was affirmed, one judge concurring separately and the chief justice dissenting.

Rather than affirm on the ground used by the court of appeals, as urged by Judge Zimmerman in his concurring opinion, Judge Matthias for the five-judge majority re-examined the entire rule, found it sup-

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[1] 64 Ohio St. 100, 59 N.E. 893 (1901); for a recent court of appeals case employing the new Ohio rule, see Ohio-River-Frankfort Cooperage Corp. v. Brainard, 148 N.E.2d 68 (1958).

[2] Buckeye State Bldg. & Loan Co. v. Schmidt, 131 Ohio St. 132, 2 N.E.2d 264 (1936); Pittsburgh, Cincinnati, Chicago & St. Louis Ry. v. Luthy, 112 Ohio St. 321, 147 N.E. 336 (1925); Nead v. Hershman, 103 Ohio St. 12, 132 N.E. 19 (1921); Perkins v. Board County Comm'rs, 88 Ohio St. 495, 103 N.E. 377 (1913).

ported by "neither experience nor reason and justice,"[3] and held that any motion for directed verdict in Ohio requests a ruling on law only.

The *Hayes* rule is variously described as the "majority rule"[4] and as the "New York rule."[5] The leading case of *Buetell v Magone*[6] had made it a fixture of federal practice prior to its abrogation by Rule 50 (a) of the Federal Rules of Civil Procedure. The reasoning upon which the rule rests has been expressed several ways,[7] but the two theories described by Judge Matthias cover the field: (1) that the consecutive motions are indications by each party that he desires to waive jury trial, and (2) that the motions indicate agreement between the parties that no question of fact remains in the case. The majority opinion finds the first theory to be inappropriate both because the facts normally indicate no such desire on the part of the complaining party (ordinarily inadvertance on the part of counsel is assigned as the reason for letting things progress to this point) and because the Ohio statutes specifically provide the method of waiving jury trial and the *Hayes* rule fits none of the specified categories.[8] The second theory is rejected on the ground that a motion for directed verdict is a request for a ruling on law only and admits no facts except for purposes of the ruling.[9]

A considerable body of case law interpreting the *Hayes* rule had been developed since inception of the rule in 1901. Jury trial was held waived by consecutive motions for directed verdict upon the pleadings after impaneling of the jury but prior to presentation of any evidence.[10] In *Perkins v. Board County Comm'rs*[11] both parties sought directed verdicts at the close of the evidence; it was held to be reversible error not to grant defendant's request that the case go to the jury when the request came after defendant's motion was overruled and prior to a ruling on plaintiff's motion.

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[3] Carter-Jones Lumber Co. v. Eblen, 167 Ohio St. 189, 207, 147 N.E.2d 486 (1958).

[4] 53 AM. JUR., *Trial* §§341-346 (1945); Annot., 108 A.L.R. 1315 (1937); Annot., 69 A.L.R. 633 (1930); Annot., 18 A.L.R. 1433 (1922).

[5] 88 C.J.S., *Trial* §256(b).

[6] 157 U.S. 154 (1895).

[7] 53 AM. JUR., *Trial* §343 (1945).

[8] OHIO REV. CODE §2315.20 (1953), provides: "In actions arising on contract, trial by jury may be waived by the parties, and in other actions with the assent of the court as follows:

"(A) By consent of the party appearing, when the other party fails to appear at the trial, in person or by attorney;

"(B) By written consent, in person or by attorney, filed with the clerk;

"(C) By oral consent in open court entered on the journal." *Cf.* N.Y. Civ. PRAC. ACT §426.

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

[10] Strangward v. American Brass Bedstead Co., 82 Ohio St. 121, 91 N.E. 988 (1910).

[11] 88 Ohio St. 495, 103 N.E. 377 (1913).

Nead v. Hershman[12] and *Pittsburgh, Cincinnati, Chicago & St. Louis Ry. v. Luthy*[13] presented a related problem. In both cases defendant first made a motion for directed verdict, and this was followed by a similar motion by plaintiff. In each case the court sustained plaintiff's motion without ruling on the motion by the defendant. In the *Hershman* case the defendant then requested the case go to the jury while in *Luthy* the defendant merely excepted to the court's ruling. The supreme court found reversible error in each instance, since neither defendant had the opportunity to determine whether he wished to go to the jury after requesting a ruling on the question of law. It is clear, however, that either defendant could have avoided the problem by reserving his right to have the case go to the jury when he made his motion.

It had also been held that the *Hayes* rule did not apply when defendant made the initial motion for directed verdict, his motion was ruled upon, and plaintiff then made a motion for directed verdict.[14] Thus the second moving party could always avoid the "trap" by waiting for a ruling on the preceding motion before making his own motion. Of course the rule did not apply to defendant's motion at the close of plaintiff's case, even if plaintiff purported to join in the motion.[15]

In *Buckeye State Bldg. & Loan Co. v. Schmidt*[16] at the close of the evidence defendant sought a directed verdict and plaintiff asked for judgment. The court then announced it would dismiss the jury, and after argument between counsel in which defendant said he was reserving the right to introduce further evidence, plaintiff announced he wished to withdraw his motion since he did not think the judge could dismiss the jury. Plaintiff did nothing more until eight days later when he filed a motion seeking a separate finding of law and facts and attempting to reserve his right to have the case go to the jury. The supreme court held plaintiff's action came too late. A later case did hold that a party is entitled to a separate finding of law and facts when the judge sits as jury after consecutive motions for directed verdict.[17]

It appears that the instant case could have been reversed, as urged by Judge Zimmerman, upon the theory underlying *Perkins, Hershman,* and *Luthy—i.e.,* that the party against whom the ruling is made should have some opportunity to reserve jury trial. However, Judge Zimmerman's suggestion that the trial judge was under a duty to explain the effect of the motions to counsel before ruling does not seem to have a basis in any prior holding. The discussion in *Ohio Jurisprudence*[18] refers only to a case in which the judge did follow this procedure and

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[12] 103 Ohio St. 12, 132 N.E. 19 (1921).

[13] 112 Ohio St. 321, 147 N.E. 336 (1925).

[14] Satterthwaite v. Morgan, 141 Ohio St. 447, 48 N.E.2d 653 (1943).

[15] Canton v. Pryke, 5 Ohio App. 364, 26 Ohio C.C. Dec. 465 (1916).

[16] 131 Ohio St. 132, 2 N.E.2d 264 (1936).

[17] Levick v. Bonnell, 137 Ohio St. 453, 30 N.E.2d 808 (1940).

[18] 39 OHIO JUR., *Trial* §219 (1935): "[T]he general rule, which is the one

in which the court of appeals held no party could later claim surprise.[19] There is also the possibility under such a holding that a party may purposely fail to reserve his right to go to the jury, hoping to get the nod from the judge, but secure in the knowledge he can always go to the jury if he loses.

It appears that the supreme court had reached a point in regard to the *Hayes* rule at which it was no longer willing to deprive a party of his constitutional right to jury trial because of counsel's inadvertence while at the same time further exceptions to the rule would have made it a mockery of two-guess verdicts. In specifically overruling *Hayes* and its subsequent cases,[20] the court has handled the matter most effectively.

The broad language in the opinion may present some problems regarding the status of waiver of jury trial generally in Ohio. How would the court now treat the following situation? At the close of the evidence both parties consecutively enter motions for directed verdict. The judge, inadvertently following the now discarded *Hayes* rule, announces he will dismiss the jury and decide the case on law and facts himself. Neither party objects, and the jury is dismissed—although there was sufficient time between the judge's pronouncement and dismissal of the jury for counsel to raise objection. Must the case now be tried anew or will counsel be deemed to have waived jury trial by their actions?[21] Too narrow an interpretation of the jury waiver statute[22] would seem to defeat substantial justice in certain limited instances.

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established by the Ohio courts, is that if both parties to an action, at the conclusion of all the evidence in the case, request the court to instruct a verdict—the plaintiff for a verdict in his favor and the defendant for a verdict in his favor—without making any request that the jury be allowed to determine any question of fact or indicating any desire to avail themselves, individually, of their right to have questions of fact submitted to the jury if their motions are denied, *particularly after the court calls attention to the legal significance of simultaneous motions by both parties and extends the opportunity to withdraw them,* the parties thereby clothe the court with the functions and duties that ordinarily rest in the hands of the jury and submit the case for its findings upon the facts as well as the law." (Emphasis added.)

[19] State Auto Mut. Ins. Assn. v. Spileski, 10 Ohio L. Abs. 618 (1931).

[20] Also specifically overruled were: Levick v. Bonnell, *supra* note 17; Industrial Comm'n v. Carden, 195 N.E. 551 (1935); Perkins v. Board County Comm'rs, *supra* note 2; Strangward v. American Brass Bedstead Co., *supra* note 10—each as it related to the *Hayes* rule.

[21] Whitworth v. Steers, 12 Ohio C.C. Dec. 272 (Cuyahoga county 1893); *aff'd mem.*, 53 Ohio St. 686, 44 N.E. 1150 (1895).

[22] *Supra* note 8.