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Effect of a Motion For New Trial on the Time for Appellate Review in Ohio and Federal Practice*

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If losing a case on the merits in the appellate court is a disappointment to the lawyer involved, to be defeated by a rule of procedure seems the most bitter of pills. This frustration causes denial of justice—the aim of all courts. The client is the one who suffers most, whether the fault lies in the ignorance and carelessness of counsel,[1] a non-liberal attitude on the part of the courts,[2] the uncertainty of the law,[3] or in a combination of these factors. The result brings the law, its administration, and the bench and bar into disrepute with the public, upon whose goodwill lawyers depend for existence.[4] The

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[1] *Cf.* Daily v. Dowty, 52 Ohio App. 84, 192 N.E. 287 (1936).

[2] *Cf.* Williams v. Braun, 65 Ohio App. 451, 30 N.E. (2d) 363 (1940).

[3] Examples of this statement will be furnished hereafter.

[4] *See* Sunderland, *Simplification of Appellate Procedure* (1929) 3 U. CIN. L. REV. 1; Mitchell, *Uniform State and Federal Practice: A New Demand for More Efficient Judicial Procedure* (1938) 24 AM. B.A.J. 981;

experience in Ohio with the New Appellate Procedure Act[5] offers an example of all these causes of fault. Responsibility for correction rests squarely upon the bench and bar.

The Act stemmed from a desire to achieve more perfect justice by simplifying procedure on review, preventing the disposition of cases other than upon their merits, and reducing the amount of litigation over purely procedural matters. But one source of difficulty created by those factors just mentioned[6] has been Section 12223-7[7] dealing with the time for perfecting the appeal. It reads—

> "The period of time after the entry of the order, judgment, decree, or other matter for review within which the appeal shall be perfected, unless otherwise provided by law, is as follows:

Lashly, *Judicial Administration and National Defense* (1940) 26 AM. B.A.J. 922; Parker, *Improving the Administration of Justice* (1941) 27 AM. B.A.J. 11, 71; *cf.* Harris, *Do Ohio Lawyers Want a Streamlined Procedure* (1939) 5 O.S.L.J. 330. Specifically on appellate procedure. *See* Bomberger, *A Simplified Code of Appellate Procedure* (1934) 9 IND. L.J. 551; Stevenson, *Common Mistakes in Appellate Procedure* (1940) 16 IND. L.J. 77; Lavine, *Technical Appellate Rules Cited as Frequent Bar to Hearing on Merits* (1940) 15 CALIF. S.B.J. 264; Sunderland, *Improvement of Appellate Procedure* (1940) 26 IOWA L. REV. 3.

[5] 116 Ohio Laws 104 (1935), Ohio Gen. Code, Sec. 12223-1 *et seq.* (effective January 1, 1936). *See* HARRIS, APELLATE COURTS AND APPELLATE PROCEDURE IN OHIO (1933); DAWSON, OHIO APPELLATE REVIEW AND FORMS (1935); MILLER AND GERKEN, COMMENTS ON PROCEDURE IN THE SUPREME COURT OF OHIO (1936); SWAN, A TREATISE ON THE LAWS OF OHIO (Cent. Ed. 1936) 220. *See* Comment, *Changes in Appellate Procedure* (1932) 36 Ohio L. Rep. 424; Harris, *New Appellate Procedure in Ohio* (1935) 1 O.S.L.J. 186; Harris, *Ohio Reforms Appellate Procedure* (1935) 19 J. AM. JUD. SOC. 29; Stevens, *Observations on the Appellate Procedure Act* (1939) 12 Ohio Bar 491; Comment, *Procedural Steps in Ohio Appellate Practice* (1940) 15 NOTRE DAME LAWYER 162; (1941) 14 Ohio Bar 89-90.

[6] *See* the remarks of Mr. Herbert E. Ritchie in *The Status of the Rule of Judicial Precedent* (1940) 14 U. CIN. L. REV. 203, 252 at 254-6.

[7] 116 Ohio Laws 106 (1935). The words "and from probate courts" were taken out by amendment. 118 Ohio Laws H.B. No. 6 (1939). The words in the proviso "or sustaining" were added by amendment. 117 Ohio Laws 615 (1937). The balance of the section, not to be considered however, reads: "(2) In all other appeals, within ten (10) days. (3) In case of insanity or death of the party after judgment, the court shall have the power to extend the time of the appeal, an additional twenty (20) days."

"1. In appeals to the supreme court, to courts of appeals, or from municipal courts to courts of common pleas, within twenty (20) days.

"Provided, that, when a motion for new trial is duly filed by either party within three days after the verdict or decision then the time of perfecting the appeal shall not begin until the entry of the order overruling or sustaining the motion for new trial. . . . "

Although much space could be devoted to consider problems raised by the main provisions of this section,[8] its proviso

[8] Ohio Gen. Code, Sec. 10216 reads—"Unless otherwise specifically provided, the time within which an act is required by law to be done shall be computed by excluding the first day and including the last; except that the last shall be excluded if it be Sunday." Enck v. Gerding, 63 Ohio St. 175, 65 N.E. 880 (1900) (statute applied to allowance of bill of exceptions). Ohio Gen. Code, Sec. 11604 provides—"All judgments and orders must be entered on the journal of the court, and specify clearly the relief granted or order made in the action. The entry must be written into the journal as soon as the entry is filed with the clerk or directed by the court and shall be journalized as of the date of the filing of said entry or of the written direction by the court." *Cf.* West. v. Meddock, 16 Ohio St. 418 (1865); Lafferty v. Shinn, 38 Ohio St. 46 (1882); Smith v. Smith, 103 Ohio St. 391, 133 N.E. 792 (1921); Cox v. Cox, 108 Ohio St. 473, 141 N.E. 220 (1923); Hayes v. Hayes, 117 Ohio St. 323, 158 N.E. 650 (1927); The State, *Ex Rel.* Industrial Commission v. Day, 136 Ohio St. 477, 26 N.E. (2d) 1014 (1940). *But cf.* Coe v. Erb, 59 Ohio St. 259, 52 N.E. 640 (1898) (judgment not "rendered" within statute, making judgment a lien on lands, till entered on journal). But as between the parties to an action when a journal entry is approved by them or their counsel and signed and approved by the trial judge, the date of filing the entry with the clerk is the date of "entry of the judgment" within former Sec. 12270, now Sec. 12223-7 and the appeal must be taken within the given period computed thereafter. The Amazon Rubber Co. v. Morewood Realty Holding Co., 109 Ohio St. 291, 142 N.E. 363 (1924), *affirming*, 18 Ohio App. 201 (1923); *In Re* Estate of Bloch, 17 Ohio C.C. (N.S.) 25 (1908). A *nunc pro tunc* order cannot start the time for an appeal to run before an appealable order has actually been entered. Charles v. Fawley, 71 Ohio St. 50, 72 N.E. 294 (1904); The Eldridge and Higgins Company v. Barrere, 74 Ohio St. 389, 78 N.E. 516 (1906) (will not defeat right to file motion for new trial); The Neracker Sprinkling Co. v. The Eureka Co., 8 Ohio C.C. 513 (1894), *aff'd*, 56 Ohio St. 750, 49 N.E. 1110 (1897) (nor bill of exceptions). But it will not extend the time for review. The Perfection Stove Co. v. Scherer, 120 Ohio St. 445, 166 N.E. 376 (1929). The same rules as to the entry of judgment

only will be examined. A motion for new trial is defined elsewhere in the Code.[9] The words "duly filed" presumably mean more than that such motion must be filed within three days, the time specified elsewhere in the Code,[10] as the proviso itself requires that the motion be filed within that time. "Duly" may mean according to the usual practice in filing such motion for new trial.[11] But common practice should accord only with the statute. Such motion must be after a "verdict or decision." "Verdict" refers to a jury trial in an action at law.[12] Is "de-

would seem to be applicable to the determination of when "the entry of the order overruling or sustaining the motion for new trial" occurs.

What constitutes a judgment or decree has been indicated. The Cincinnati Polyclinic v. Balch, 92 Ohio St. 415, 111 N.E. 159 (1915); Chandler & Taylor Co. v. Southern Pacific Co., 104 Ohio St. 188, 135 N.E. 620 (1922); In Matter of Estate of Parmelee, 134 Ohio St. 420, 17 N.E. (2d) 747 (1938). "Order" is in Sec. 12223-7 used as "final order," since only final orders, along with judgments and decrees, are made reviewable. Ohio Gen. Code, Sec. 12223-3. The definition of "final order" has not been materially changed since that in Rev. Stat., Sec. 6707, now Ohio Gen. Code Sec. 12223-2. The clause "unless otherwise provided by law" in Ohio Gen. Code, Sec. 12223-3 and 12223-7, together with Sec. 12223-7(2), the ten day provision, creates difficulty. *Cf.* North American Committee v. Bowsher, 132 Ohio St. 599, 9 N.E. (2d) 617 (1937); Saslaw v. Weiss, 133 Ohio St. 496, 14 N.E. (2d) 930 (1938); The State v. Grisafulli, 135 Ohio St. 87, 19 N.E. (2d) 645 (1939); In Matter of Estate of Knechtges, 138 Ohio St. 24, 32 N.E. (2d) 410 (1941); Shaw v. Al Naish Moving & Storage Co., 55 Ohio App. 211, 9 N.E. (2d) 300 (1936); Kearns v. Sherrill, 63 Ohio App. 533, 27 N.E. (2d) 407 (1940), *aff'd*, 137 Ohio St. 468, 30 N.E. (2d) 805 (1940); Cryer v. Conard, 64 Ohio App. 351, 28 N.E. (2d) 937 (1940); Clare & Foster, Inc. v. Diamond S. Electric Co., 66 Ohio App. 376, 34 N.E. (2d) 284 (1940).

[9] Ohio Gen. Code, Sec. 11575.

[10] Ohio Gen. Code, Sec. 11578. It must also be filed at the same term. Hoffman v. Knollman, 135 Ohio St. 170, 20 N.E. (2d) 221 (1939). But Sec. 12223-7 does not specify this additional time requirement as does Sec. 11578?

[11] It might be argued that after judgment or decree in any action, either at law or in equity, no matter whether issues of law or fact or both be involved, the lower court should be given an opportunity to reconsider the case to correct any errors intervening, when a more mature, less hasty consideration may be had, and that the time to perfect an appeal should not commence until that court has reaffirmed its former judgment or decree by overruling the motion. Only in this way would the remedy in the lower court be completely exhausted. *See* Brown v. Coal Company, 48 Ohio St. 542, 543, 28 N.E. 669 (1891).

[12] Ohio Gen. Code, Sec. 11420-9.

cision" likewise confined to that of the court in an action at law where a jury is waived? An even more difficult problem arises in an attempt to answer the question:—What is the "verdict or decision" after which the motion for new trial is filed and from which the three-day period for filing it is computed?[13] Does

[13] Ohio Gen. Code, Sec. 12223-7 reads— " . . . when a motion for a new trial is duly filed . . . within three days after the verdict or decision . . . " What action of the court or jury will commence the three-day period running, within which the motion for new trial must be filed? A motion for new trial not filed following such action of the court or jury would not only be not duly filed, but would probably be a nullity. When in an action at law the jury returns a general verdict, Ohio Gen. Code, Sec. 11599 contemplates filing a motion for new trial thereafter. But to require the motion to be filed after a special verdict in accord with Ohio Gen. Code, Sec. 11420-14 would deprive the losing party of the right to allege grounds for new trial under Ohio Gen. Code, Sec. 11576 involving erroneous application of law to those facts as found therein. *But cf.* Ohio Gen. Code, Sec. 11420-12 (verdict general or special). If facts are correctly found by a special verdict, no new trial of facts is needed, error being removed by re-applying the proper law to them. Difficulty arises in actions either at law or in equity where the court is the trier of fact. What is the "decision" after which a motion must be filed? The Industrial Commission v. Musselli, 102 Ohio St. 10, 130 N.E. 32 (1921) held in an action at law tried to the court that "decision" in Ohio Gen. Code, Sec. 11578 means "judgment" so that the motion for new trial filed within three days, not of oral announcement by the court of its findings, but of filing of the judgment entry with the clerk was within the time given by Sec. 11578. *Cf.* The City of Cincinnati v. Kilgour, 13 Ohio C.C. (N.S.) 415 (1910); State, on the Relation of Ayres v. Green, 22 Ohio C.C. (N.S.) 321 (1915) (modifying *Kilgour* case); The Colerain Building & Loan Company v. Hosea, 13 Ohio N.P. (N.S.) 244 (C.P. 1912); Flowers v. Metcalf, 24 Ohio L. Abs. 169 (C.P. 1937). The *Musselli* case was based on The Buckeye Pipe Line Company v. Fee, 62 Ohio St. 543, 57 N.E. 446 (1900). *See* The Eldridge and Higgins Company v. Barrere, 74 Ohio St. 389, 78 N.E. 516 (1906). Compare Boss v. The Alms & Doepke Co., 17 Ohio App. 315 (1923) (motion for new trial following written opinion of court and overruled by another written opinion held to begin time within which to perfect bill of exceptions, though final order not entered till after bill filed), with Cox v. Cox, 34 Ohio App. 192, 170 N.E. 592 (1929) (in action at law tried to court, motion for new trial filed after announcement of court's opinion instead of judgment entry held premature); *see* Roadway Express, Inc. v. Fidelity & Guarantee Fire Corp., 52 Ohio App. 401, 410, 3 N.E. (2d) 805, 809 (1935) (finding filed with clerk, but not journalized). One court has thought that, although the *Musselli* case permits the filing of a motion for new trial after judgment entry, this does not preclude the filing of such motion after findings made by the court, but not entered of record or upon the journal so that a bill of exceptions perfected within the time after overruling such motion is properly filed. Snyder v. Euclid-105th Properties Co., 5 Ohio L. Abs. 742 (1927).

the fact that a judgment may not be reviewed until a motion for

Confusion has resulted over the effect of Boedker v. The Warren E. Richards Co., 124 Ohio St. 12, 176 N.E. 660 (1931) on the *Musselli* case. The former held that in an action at law tried to the court a judgment journalized immeditely upon the court's finding does not start the statute of limitations on appeal running, the time for which commences only after overruling of a motion for new trial and subsequent entry of a second judgment. The Court said p. 19, "Technically speaking, the finding of the court would not be a verdict of a jury, but the rights of the parties would be the same in either event. . . .

"We have therefore reached the conclusion that the first judgment, entered within the three-day period, when a judgment could not have been entered upon the verdict of a jury, was ineffective to start the running of the limitation." and p. 18, "If the clerk was without power to enter a judgment until after expiration of the time for the filing of a motion for a new trial, it is difficult to see upon what principle the court could enter the judgment." The *Boedker* case is not contrary to the *Musselli* case, because in the former the "finding" of the court was journalized as a final, appealable judgment. *See* Roadway Express, Inc. v. Fidelity & Guaranty Fire Corp., *supra.* If the *Musselli* case requires the losing party to await the entry of judgment as the "decision" after which the motion for new trial is to be filed, there could not properly be any talk in the *Boedker* case about a judgment having been erroneously and prematurely entered during the time within which a motion for new trial may be filed. Until that judgment is entered there is nothing after which to file the motion and the time for filing, of course, will not run. But the *Boedker* case wrongly implies that the oral finding of the court is the act after which a motion for new trial is to be filed. This would indicate that, had a judgment been journalized after three days from the oral finding of the court, a motion for new trial following after would have been too late. Cultice v. DeMaro Realty Co., 16 Ohio L. Abs. 396 (1934) (written opinion), *rehearing given,* 16 Ohio L. Abs. 625 (1934) (based on *Musselli* case), 29 Ohio L. Abs. 566 (1939) (written opinion does not take place of jury verdict); *see* McLaughlin v. Rawn, 30 Ohio L. Abs. 609, 611 (1939). The practice erroneously persists of filing a motion for new trial after oral decision. *See* The State, *Ex Rel.* Industrial Commission v. Day, 136 Ohio St. 477, 26 N.E. (2d) 1014 (1940). And the *Musselli* case, although holding only that a motion for new trial can be filed after judgment entry, undoubtedly precludes the filing of such motion after oral finding of the court. The implication of the *Boedker* case remains, however, that a written finding of fact or of fact and law in an action at law tried to the court, filed as part of the record or entered upon the journal or both, even though not an appealable order, not only starts the three-day period for a motion for new trial, but is the only action of the court after which a motion can properly be filed. In other words, for the losing party thereafter to await the entry of final judgment and then to file his motion would not be filing such motion "within three days after the verdict or decision" as required by Sec. 12223-7. *Cf.* American Society of Chiropractors, Inc. v. Meeker, 14 Ohio L. Abs. 392 (1933); Pittsburgh Coal Co. v. Hamburg, 22 Ohio L. Abs. 283 (1935).

new trial has been overruled mean that such disposition gives the judgment such degree of finality that the order entered

McLaughlin v. Rawn, *supra.* (motion for new trial following original decision of court, part of record, but presumably not journalized). A finding of fact only, though journalized, would have the same difficulty as a special verdict, if a motion for new trial must be filed thereafter. But such practice seems proper.

What is the proper answer in an equity case where Ohio Gen. Code, Sec. 11599 has no application? *See* Anderson v. Local Union No. 413, 29 Ohio L. Abs. 364, 368 (1939) (motion for new trial proper before judgment entered). A good argument can be made that Sec. 12223-7 draws a distinction between "order, judgment, decree," on the one hand, and "verdict or decision," on the other, so that, if a finding in an equity case were made in writing and filed as an entry in the case, the motion for new trial must be filed within three days thereof and the judgment follows thereafter. *Cf.* Ohio Gen. Code, Sec. 11580. But the *Anderson* case indicated that the reasoning of the *Musselli* case also permits a motion for new trial even after judgment in an action in equity. The former uses the procedure of Sec. 11599 in an action in equity and, if followed, would make unnecessary the proviso of Sec. 12223-7 because no final, appealable order, judgment, or decree would be entered until disposition of the motion for new trial. Hence the time to appeal could in no way be affected by the pendency of such motion. But Sec 11599 does not prevent entry of a *decree* during the pendency of the motion. *See* fn. 28, *infra.* Therefore to hold that the only action of the court after which a motion for new trial may properly be filed is the first or finding entry would not make useless the proviso of Sec. 12223-7. The *Boedker* case with the *Musselli* case may give the losing party a choice to file his motion for new trial in actions tried by the court in law or equity either after final judgment or a prior finding entry.

In summary of the law at present, in an action tried to the court, either in law or equity, the losing party may wait at least until a journal entry to file his motion for new trial. If such entry is a final judgment, this is the only act of the court after which a motion can be properly filed. If it is a finding of fact or of fact and conclusions of law, though not an appealable order, he probably cannot safely await the entry of judgment thereafter to file his motion, but must file it after the first entry . In Matter of Estate of Wuichet, 66 Ohio App. 429, ... N.E. (2d) .. (1940), *aff'd*, 138 Ohio St. 97, 33 N.E. (2d) 15 (1941); *see* The Industrial Commission v. Musselli, 102 Ohio St. 10, 16-17, 130 N.E. 32, 34-35 (1921); remarks of Oliver G. Bailey in *Trial By Jury* (1937) 11 U. CIN. L. REV. 119, 209 at 211; *cf.* Rules of Practice of The Courts of Appeals of Ohio (1936) Rule XI. On the other hand, a motion following this first entry may be premature, if a final judgment is the only entry after which a motion may properly be filed. But overruling such motion corrects the error. Compare Cox v. Cox, 34 Ohio App. 192, 170 N.E. 592 (1929) (motion for new trial to announced opinion held premature though overruled), with *In re* Estate of Lowry, 66 Ohio App. 437, ... N.E. (2d) .. (1941) and Brenholts v. Brenholts, 19 Ohio L. Abs. 309 (1935). A careful lawyer should file two motions.

thereon is the one from which to appeal?[14] When is such motion overruled or sustained?[15] What is a "motion for new trial?" When is it "duly filed?" The answers to these last two specific questions will answer the broader question—Under what circumstances will the twenty-day period given for appeal after the entry of the reviewable order be tolled?

The Supreme Court in two cases, *The State*, Ex Rel. *Longman* v. *Welsh*[16] and *Cullen* v. *Schmit*,[17] has formulated tests to answer these last three queries. It is the purpose of this article to analyze these tests and to apply them with the hope of reducing uncertainty over the proper application of the proviso of Section 12223-7.[18]

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[14] *Cf.* The Liberal Savings & Loan Co. v. The Frankel Realty Co., 64 Ohio App. 97, 28 N.E. (2d) 367 (1940) (dissent). It has been held that a notice of appeal stating as the order from which the appeal is taken the one overruling a motion for new trial brings before the reviewing court a non-appealable order and cannot be amended under Ohio Gen. Code, Sec. 12223-5 to indicate the prior, appealable decree. Williams v. Braun, 65 Ohio App. 451, 30 N.E. (2d) 363 (1940); Mahaffey v. Stine, 28 Ohio L. Abs. 361 (1938); Anderson v. Local Union No. 413, 29 Ohio L. Abs. 364 (1939); Cultice v. DeMaro Realty Co., 29 Ohio L. Abs. 566 (1939); Covington Building & Loan Ass'n v. Yost, 31 Ohio L. Abs. 672 (1940). *But cf.* Couk v. The Ocean Accident & Guarantee Corp., Ltd., 138 Ohio St. 110, 33 N.E. (2d) 9 (1941) (affirming amendment permitted). *Contra:* Mosey v. Hiestand, 138 Ohio St. 249, 34 N.E. (2d) 210 (1941) (reversing amendment refused), 7 O.S.L.J. 457.

[15] *Cf.* Wagner v. Long, 133 Ohio St. 41, 11 N.E. (2d) 247 (1937) (two motions each treated as one for new trial, one overruled, other sustained); The Independent Coal Company v. Quirk, 16 Ohio C.C. (N.S.) 546 (1905), *aff'd*, 80 Ohio St. 746, 89 N.E. 1120 (1909) (amended motion overruled separately); Bradley v. Herron, 20 Ohio C.C. (N.S.) 282 (1912); Thompson v. Rutledge, 32 Ohio App. 537, 168 N.E. 547 (1929); The J. & F. Harig Co. v. City of Cincinnati, 61 Ohio App. 314, 22 N.E. (2d) 540 (1938); Ross v. Pfeiffer, 29 Ohio L. Abs. 47 (1939); Lynch v. Lynch, 20 Ohio Op. 294 (C. of A. 1940) (motion to modify alimony held motion for new trial).

[16] 133 Ohio St. 244, 13 N.E. (2d) 119 (1938).

[17] 137 Ohio St. 479, 30 N.E. (2d) 994 (1940). *See also* The Liberal Savings & Loan Co. v. The Frankel Realty Co., 137 Ohio St. 489, 30 N.E. (2d) 1012 (1940).

[18] *See* Stevens, *Observations on The Appellate Procedure Act* (1939) 12 Ohio Bar 491, 500-503. The principles applicable to trials are likewise applicable to hearings in the court of appeals on questions of law and fact where a trial *de novo* is given. *Cf.* Isham v. Fox, 7 Ohio St. 317 (1857); Ide

In the *Longman* case the question for determination was whether the time for perfecting the appeal began to run from the date on which the entry was filed sustaining the demurrer and dismissing the petition there involved or from that subsequent date on which the application for rehearing and new trial was denied. In deciding that the former date governed the court stated that the controlling consideration was "whether a motion for a new trial was *proper*, *authorized*, or *effective* in the circumstances." A new trial involving "a reexamination of an *issue of fact* in the same court after trial," there was here "no trial on any issue of fact which would make a motion for a new trial the *necessary* or *proper procedure*." (italics supplied).

The test enunciated in the *Cullen* case was an interpretation of the words "duly filed." "A motion for a new trial is duly filed only when, if granted, it would result in a reexamination of the issues of fact presented by the pleadings." In other words, *any motion* labeled "motion for new trial" and filed within three days of a verdict, report or decision, regardless of the nature of the hearing to which it is addressed, the issues there involved, and the errors alleged as grounds for such "motion," will not necessarily toll the twenty-day period.

The problem is to harmonize the test of the *Longman* case with the more recent and specific standard of the *Cullen* case.[19] Thus the question as to whether the period for seeking appellate review is tolled during the pendency of a motion for new trial may be approached from two angles, whether the motion

v. Churchill, 14 Ohio St. 372 (1863); Turner v. Turner, 17 Ohio St. 449 (1867); The Union Trust Co. v. Lessovitz, 122 Ohio St. 406, 171 N.E. 849 (1930); Dehmer v. Campbell, 124 Ohio St. 634, 180 N.E. 267 (1932); Ohio Gen. Code, Sec. 12223-1 (3) and 12223-21 (2). Compare The State, *Ex. Rel.* Anderson v. Spence, 94 Ohio St. 252, 113 N.E. 1048 (1916), with Boone v. The State, 109 Ohio St. 1, 141 N.E. 841 (1923). Thus a motion for new trial in the lower court is not necessary to appeal on questions of law and fact. Garrett v. Hagan, 33 Ohio App. 553, 170 N.E. 191 (1929); *In re* Estate of Murphy, 27 Ohio L. Abs. 221 (1938).

[19] The opinion in the *Cullen* case expressly distinguished the *Longman* case.

is (1) effective or (2) necessary, authorized, or proper procedure. The first raises the distinction between law and equity, and the second requires a careful analysis into the nature of a motion for new trial, the causes for which granted, and the need for a new trial to cure the errors involved.

"Duly Filed" as Meaning "Effective"

It is basic in appellate procedure in Ohio that the only order from which appeal may be taken is a final order. Hence if no final order, judgment, or decree has been entered before a motion for new trial is filed, pending, and overruled, the time within which to take the appeal not only will not run during pendency of such motion, but will not begin until a judgment is entered following the overruling of such motion. Since 1902 a judgment in a jury case cannot be entered until a motion for new trial, if filed within three days of the verdict, has been overruled. Ohio Gen. Code, Section 11599 reads—[20]

> "When a trial by jury has been had, judgment must be entered by the clerk in conformity to the verdict, . . . immediately after the time for the filing of a motion for a new trial if it has not been filed. When a motion for a new trial is filed, then such judgment shall be entered only when the court has sustained such verdict by overruling the motion. Upon such overruling it shall immediately be entered."

Since the overruling *per se* of a motion for new trial is not a final order,[21] time for appellate review will not begin even then,

[20] 95 Ohio Laws 351 (1902), *amending*, Rev. Stat., Sec. 5326. Before the amendment a judgment could be entered immediately upon the verdict, thus starting the limitation period for review even during the pendency of a motion for new trial. Young v. Shallenberger, 53 Ohio St. 291, 41 N.E. 518 (1895); Dowty v. Pepple, 58 Ohio St. 395, 50 N.E. 923 (1898) (same rule, though because of absence of trial judge motion for new trial not overruled till expiration of time for review). The result was unfortunate, especially when the overruling of a motion for new trial was necessary as a basis for assigning errors upon appeal. *See* fn. 42, *infra*.

[21] Young v. Shallenberger, 53 Ohio St. 291, 41 N.E. 518 (1895); Unkle v. Unkle, 66 Ohio App. 364, 34 N.E. (2d) 71 (1940).

but will commence only when judgment is thereafter entered, although in actual practice the same entry overruling the motion for new trial also enters the final judgment. Hence the question of whether a motion for new trial tolls the period for review is answered here by the fact that during its pendency no judgment exists to review. Thus the motion for new trial preventing the entry of judgment may be said to be "effective in the circumstances."[22]

But Section 11599 seems to be limited only to those instances when "a trial by jury has been had."[23] Hence the Supreme Court took a liberal step in *Boedker v. The Warren E. Richards Co.*[24] when it applied Section 11599 to actions at law[25] where a jury is waived. The court stated at p. 19:—

> "The fact that a jury was waived . . . does not affect the principle involved. Technically speaking, the finding of the court would not be the verdict of a jury, but the rights of the parties would be the same in either event. It will be observed that the trial court, after the overruling of the motion for new trial, entered a new judgment without vacating the former judgment."

The rule of the *Boedker* case presumably applies only to actions at law where a jury is waived instead of more inclusively to all actions triable by jury under Ohio Gen. Code, Section 11379, because the syllabus supporting the former view conflicts with the opinion of the case and the facts themselves involved

[22] *Cf.* Wells, Jr. v. Wells, 105 Ohio St. 471, 138 N.E. 71 (1922).

[23] Price v. Hathaway, 16 Ohio C.C. (N.S.) 599 (1907), *aff'd*, 79 Ohio St. 478, 87 N.E. 1140 (1909); Morton v. Savin, 17 Ohio App. 51 (1922); *cf.* The M. J. Rose Co. v. Ross, 23 Ohio App. 23, 154 N.E. 346 (1926).

[24] 124 Ohio St. 12, 176 N.E. 660 (1931).

[25] The difference in Ohio between a jury and a non-jury case is not exactly the same as that between an action at law and one in equity. *See* Ohio Gen. Code, Sec. 11379; *cf.* Gunsaullus v. Pettit, 46 Ohio St. 27, 17 N.E. 231 (1888); Wagner v. Armstrong, 93 Ohio St. 443, 113 N.E. 397 (1916); Ireland v. Cheney, 129 Ohio St. 527, 196 N.E. 267 (1935). Since the Constitution of 1912 an action where a right to a jury trial is accorded may still be appealed if a "chancery" case; i.e., on questions of law and fact.

only an action at law. But the court deemed that it was drawing the distinction between a right and no right to a jury trial, the basis of a holding. The law-equity difference was considered only in relation thereto, making it a dictum as a basis for the narrower interpretation of the case. The broader view, furthermore, seems to be the more logical distinction to draw as well as to accord more easily with the wording of Section 11599—"When a trial by jury has been had"— thus construed to read, "When a trial *triable* by jury has been had." The more limited interpretation recasts the statute to read, "When a trial *at law* has been had." This form, however, excludes merely those few actions in equity "for the recovery of money only," where a right to a jury trial is afforded by Ohio Gen. Code, Section 11379, but in these situations Section 11599 will be inapplicable or not, depending upon whether a jury is or is not waived, a rather fortuitous result in the light of the object which the *Boedker* case was intended to accomplish. Hence in an action at law, either with or without a jury, the entry upon the journal of a judgment within the three-day period after jury verdict or finding entry by the court will be ineffective to start the statutory period on review. The same is true when judgment is entered during the pendency of a motion for new trial filed within time, unless that judgment can be considered the overruling thereof.[26] The time for appeal then will begin only upon entry of judgment after overruling such motion.[27]

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[26] *See* fn. 15, *supra.*

[27] The holding of the *Boedker* case was based on Shelley v. The State, 123 Ohio St. 28, 173 N.E. 730 (1923) (time to appeal from conviction runs from judgment entry after overruling motion for new trial). The cases following the *Boedker* case are:—The Bruce-MacBeth Engine Co. v. J. P. Eustis Manufacturing Co., 8 Ohio App. 341 (1917); Baylor v. Killinger, 44 Ohio App. 523, 186 N.E. 512 (1933); Kizner v. Buckeye Union Casualty Co., 45 Ohio App. 521, 187 N.E. 311 (1933) (reason for rule is motion for new trial needed to review evidence in law action); Midland Acceptance Corp. v. General Motors Acceptance Corp., 49 Ohio App. 243, 197 N.E. 120 (1934); Drucker v. The Travelers Ins. Co., 49 Ohio App. 526, 197 N.E. 492 (1934); Simcoe v. Kampf Herbal Laboratories Co.,

But a motion for new trial has never been effective to prevent the entry of a judgment or decree in equity cases, the situation with respect to actions at law as well before 1902, so that until the passage of the New Appellate Procedure Act, the pendency of such a motion was held not to toll the statutory period on review.[28] The same rule has been applied to cases

27 Ohio L. Abs. 141 (1935); *see* Kelley v. Hermann, 23 Ohio C.C. (N.S.) 156, 158-60 (1914) (concurring opinion calls for application of *Boedker* case to equity action); *cf.* Klein v. Realty Board Investors, Inc., 48 Ohio App. 235, 192 N.E. 867 (1934) (*Boedker* case not applicable when defendant's motion for judgment granted). *Contra*: Ross v. Pfeiffer, 29 Ohio L. Abs. 47 (1939) (motion to dismiss). Not only must the motion for new trial be specifically overruled, but a judgment must be thereafter entered. Otherwise an appeal is premature. Industrial Commission v. Wodinsky, 130 Ohio St. 267, 198 N.E. 867 (1935); The Columbus Railway, Power & Light Co. v. The C. & Z. Furniture, Warehouse & Auction Co., 44 Ohio App. 159, 184 N.E. 20 (1932); Getzug v. The Belvedere Building Co., 45 Ohio App. 326, 187 N.E. 22 (1933); Reiter v. Ginocchio, 45 Ohio App. 434, 187 N.E. 247 (1933); Cramer v. Cramer, 63 Ohio App. 358, 26 N.E. (2d) 785 (1938); Jones v. Indust. Comm., 31 Ohio L. Abs. 356 (1939). Compare Kuhn v. Industrial Commission, 63 Ohio App. 279, 26 N.E. (2d) (1939) (motion for new trial not waived by filing notice of appeal) and Paul A. Sorg Paper Co. v. Hayes, 35 Ohio L. Rep. 512 (1931), with The Liberal Savings & Loan Co. v. The Frankel Realty Co., 137 Ohio St. 489, 30 N.E. (2d) 1012 (1940). But when no motion for new trial was ever filed after a first judgment entry, such entry was held voidable only and hence appealable. The Western Union Telegraph Co. v. The Dixie Terminal Co., 59 Ohio App. 305, 17 N.E. (2d) 954 (1938). The limitation of "duly filed" might be read into Sec. 11599 so that, although a motion for new trial is filed after jury verdict or court's finding, it will not prevent the entry of judgment. Here the motion could be said not to have been "duly filed" because not "effective in the circumstances."

[28] The leading case is Craig v. Welply, 104 Ohio St. 312, 136 N.E. 143 (1922) (action to set aside conveyance and transfer of stock). Section 11599 was held not to prevent immediate entry of a decree, the date of which marked the beginning of the time to appeal. A motion for new trial then does not toll such period. Brown v. Coal Company, 48 Ohio St. 542, 28 N.E. 669 (1891); Fountain Square Building, Inc. v. New Era Cafe, 45 Ohio App, 479, 187 N.E. 364 (1933); The Ohio Associates Co. v. Pritz, 48 Ohio App. 567, 194 N.E. 609 (1934) (but time for filing bill of exceptions runs from overruling motion for new trial); Marquart v. Baltimore & Ohio Rd. Co., 49 Ohio App. 141, 195 N.E. 396 (1934); The First National Bank v. The Kittoe Boiler & Tank Co., 62 Ohio App. 411, 24 N.E. (2d) 458 (1939) (after New Appellate Procedure Act); Showers v. Prundential Ins. Co., 24 Ohio L. Abs. 312 (1935) (rule of *Craig* case applied to filing bill of exceptions); Haines v. Peffer, 31 Ohio L. Abs. 675 (1940). *Foun-*

neither actions in equity nor triable to a jury where Section 11599 does not obtain to make unnecessary the question whether a motion for new trial tolls the time to appeal.[29]

When Section 12223-7 was passed, it was arguable that the same rule regarding the time for appeal in cases not governed by Section 11599 was still applicable. The word "decision" in "verdict or decision" might well refer to a decision by the court in an action at law where a jury has been waived. On the other hand, the proviso thus limited to an action at law, would be meaningless because no judgment could be entered by reason of Section 11599 until the overruling of the motion for new trial, the motion here delaying not the time to seek appellate review, which would otherwise run, but the time to render judgment. Furthermore, the tenor of Section 12223-7 implies that a judgment has already been entered, the situation applicable to all except law or jury cases. Therefore "decision" would include other actions where the court is also the trier of fact.[30] But a dictum of the Supreme Court in *The State*, Ex Rel. *Longman*

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tain Square Building, Inc. v. *New Era Cafe, supra.* indicated that Sec. 11599 should be applicable to chancery cases by referring to Ohio Gen. Code, Sec. 11421-3 reading that so "far as in their nature applicable, the provisions of this chapter respecting trials by jury, apply to trials by the court." This section, however, can not make Sec. 11599 applicable to non-jury cases, because the latter section does not appear in the Code chapter referred to by Sec. 11421-3.

[29] Wells, Jr. v. Wells, 105 Ohio St. 471, 138 N.E. 71 (1922) (action for divorce where new trial motion held ineffective to delay time to appeal, even on weight of evidence, since "motion for new trial affects the time when the limitation within which a petition in error may be filed begins to run only in those cases where the motion for a new trial prevents the entry of a judgment"). Heigel v. Heigel, 125 Ohio St. 638, 186 N.E. 99 (1932); *In re* Guardianship of Gausepohl, 51 Ohio App. 261, 200 N.E. 520 (1935) (exceptions to account of guardian in probate court), (1937) 7 Ohio Op. 309; Neth v. Neth, 51 Ohio App. 267, 200 N.E. 517 (1935) (petition to vacate judgment); Borst v. Borst, 22 Ohio L. Abs. 203 (1936); Rabold v. Rabold, 23 Ohio L. Abs. 127 (1936); *cf.* McGowan v. Rishel, 125 Ohio St. 77, 180 N.E. 542 (1932) (dismissal of one defendant for misjoinder).

[30] The distinction between law and equity was meant to be abolished *See* DAWSON, OHIO APPELLATE REVIEW AND FORMS (1935) 24-25; MILLER AND GERKEN, COMMENTS ON PROCEDURE IN THE SUPREME COURT OF OHIO (1936) 5-6; Ohio Gen. Code, Sec. 10214.

v. Welsh,[31] where an application for rehearing and new trial after dismissal of a petition on demurrer was held not to delay the time for appeal because no trial of an issue of fact had been had, concluded that the principle of the *Craig* and *Wells* cases governed. "The application for rehearing and a new trial did not delay the operative effect of the judgment entry dismissing the petition, . . ."[32] These words induced the Court of Appeals in *The First National Bank v. The Kittoe Boiler & Tank Co.*[33] to continue to apply the rule of the *Craig* case to actions in equity, in spite of Section 12223-7, thus necessitating the dismissal of the appeal, even though filed within twenty days of overruling a motion for new trial. But another Court of Appeals in *The State*, Ex Rel. *Squire v. Winch*[34] went the other way and the Supreme Court affirmed,[35] holding that "decision" is

[31] *See* 133 Ohio St. 244, 246, 13 N.E. (2d) 119, 120 (1938).

[32] What the court probably meant was that, just as the motion for new trial filed after a finding in equity does not delay entry of the decree, so here no trial of an issue of fact having been had to make a motion for new trial "proper procedure," the time for appeal was not delayed during the pendency of the application.

[33] 62 Ohio App. 411, 25 N.E. (2d) 458 (1939). The same Court of Appeals followed this case in Moock v. The First National Bank, No. 1810 (1939); The State of Ohio, *Ex Rel.* Henry v. Packer, No. 1841 (1939); Baker v. Frazier, No. 1857 (1940). State, *Ex Rel.* Lavelle v. Ness, No. 16199 (1939) (in mandamus action Court of Appeals of Cuyahoga County followed same rule).

[34] 62 Ohio App. 161, 23 N.E. (2d) 642 (1939) (action to set aside conveyance of real estate). A motion for new trial filed after the entry of the court's judgment was held to delay the time for review. *See* Hart and Hart, *Review of Ohio Case Law for 1939* (1940) 16 Ohio Op. 294, 313; The Liberal Savings & Loan Co. v. The Frankel Realty Co., 64 Ohio App. 97, 28 N.E. (2d) 367 (1940); Williams v. Braun, 65 Ohio App. 451, 453, 30 N.E. (2d) 363, 364 (1940); Mahaffey v. Stine, 28 Ohio L. Abs. 361, 362 (1938); Anderson v. Local Union No. 413, 29 Ohio L. Abs. 364, 366-69 (1939); Cultice v. DeMaro Realty Co., 29 Ohio L. Abs. 566, 569 (1939); McLaughlin v. Rawn, 30 Ohio L. Abs. 609, 611 (1939); Covington Building & Loan Ass'n. v. Yost, 31 Ohio L. Abs. 672, 674 (1940); Haines v. Peffer, 31 Ohio L. Abs. 675, 677 (1940).

[35] The State, *Ex Rel.* Squire v. Winch, 137 Ohio St. 479, 30 N.E. (2d) 994 (1940). The court said at pp. 482-3, "If the process of simplification is to be accomplished the language of the act must be accorded a liberal construction. With these premises in mind what distinction does this section recognize between an action at law and a suit in chancery with reference to

not restricted to actions at law, but here includes "a decree in a suit in chancery." The result is that the same time for appeal applies to cases either in law or equity (including presumably the special actions in divorce and probate)[36] when a motion for new trial is "duly filed," notwithstanding the query raised by the words in *The Liberal Savings & Loan Co. v. The Frankel Realty Co.*[37] This case, decided the same day as the *Cullen* case, held without "determining whether a party may perfect his appeal within twenty days after the overruling of the motion for a new trial in a chancery case if he elects to wait" that an appeal on questions of law and fact may be taken within twenty days after the journal entry of final judgment and during the pendency of a motion for new trial, such motion thereby being waived. Although the distinction between actions at law and those in equity with respect to the effect of the pendency of a motion for new trial upon the time for appellate review has been abolished, a motion for new trial must be considered in

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the perfecting of an appeal? More exactly, what it meant by the wording "verdict or decision?" Is the use of the word "decision" restricted to actions at law? A close study of this and cognate sections discloses nothing to indicate that the term is employed in other than its broad, generic sense of a final determination of the rights of the parties in an action. Therefore, to hold that the word "decision" excludes either a judgment in an action at law or a decree in a suit in chancery would require not only judicial legislation but also the revival of a technical and confusing distinction that could serve no useful purpose." *Cf.* Couk v. The Ocean Accident & Guarantee Corp., Ltd., 138 Ohio St. 110, 33 N.E. (2d) 9 (1941) (jurisprudence to find expression in absolute justice, not refinements of procedural technique).

[36] Weeden v. Weeden, 116 Ohio St. 524, 156 N.E. 908 (1927) (divorce); The Exposition Building and Loan Co. v. Spiegel, 12 Ohio C.C. 761 (1893) (probate); *cf.* Trimble v. Koch, 26 Ohio St. 435 (1875); Ohio Gen. Code, Sec. 10501-22. Municipal courts are usually given the same power to grant new trials as are the courts of common pleas. *Cf.* Ohio Gen. Code, Sections 1558-18 (Cincinnati); 1558-67 (Columbus); 1579-28 (Cleveland); 1579-63 (Dayton); 1579-104 (Hamilton); 1579-145 (Youngstown); 1579-210 (Alliance); 1579-245 (Sandusky); 1579-302 (Toledo); 1579-344 (Zanesville); etc.

[37] 137 Ohio St. 489, 30 N.E. (2d) 1012 (1940), *affirming*, 64 Ohio App. 97, 28 N.E. (2d) 367 (1940). Would a notice of appeal filed over twenty days from entry of the decree be such a waiver of a pending motion for new trial that the twenty-day period would not be tolled because of the non-existence of such motion?

the light of the additional tests of whether such motion is necessary, proper, or authorized procedure.[38]

[38] In The State, *Ex Rel.* Squire v. Winch, 62 Ohio App. 161, 23 N.E. (2d) 642 (1939) the Court said at p. 162—"The filing of the motion for a new trial within three days of the recording of the decree by the trial court was not only a proper but a necessary procedure, in an attempt to secure a reexamination of issues of fact after conclusion of the trial in chancery, and the entry of the judgment." This might be interpreted to mean that a motion for new trial is essential as a basis for an appeal on questions of law and fact, "re-examination of issues of fact" meaning re-examination in the appellate court. The conclusion, however, was rendered unsound by the *Liberal Savings & Loan Co.* case holding that an appeal on questions of law and fact can be taken during the pendency of such motion, which is thereby waived. *See* McLaughlin v. Rawn, 30 Ohio L. Abs. 609 (1939) at p. 611—"Under the new procedural act, Sec. 12223-7, GC motion for new trial may be filed in chancery cases where the claimed errors are predicated upon such matters as would be manifest through a bill of exceptions, . . . " Is tl is an implication that this situation may be the only one where a motion for new trial filed after decree in equity is permissible?

"Effective" might also be interpreted to mean that there exists a reasonable chance that the trial court will grant such motion. Such interpretation, however, would cause increased litigation.

Other types of motions in the nature of applications for rehearing do not suspend the time to appeal from the order, judgment, or decree to which directed. The Board of Commissioners v. Harshman, 101 Ohio St. 529, 130 N.E. 935 (1920) (modification of decree on contempt proceedings); The State, *Ex Rel.* Kriss v. Richards, 102 Ohio St. 455, 132 N.E. 23 (1921) (motion to vacate entry overruling motion for new trial); Wyant v. Russell, 109 Ohio St. 167, 142 N.E. 144 (1923) (same); City of Dayton v. Public Utilities Commission, 111 Ohio St. 476, 145 N.E. 849 (1924) (even though application for rehearing must be filed to review order of Commission); The State, *Ex Rel.* Lanker v. Kelsey, 126 Ohio St. 599, 186 N.E. 508 (1933). Compare Duncan v. The State, *Ex Rel.* Williams, 119 Ohio St. 453, 164 N.E. 527 (1928) (motion to certify as conflict), with Harter v. Marsh, 118 Ohio St. 145, 160 N.E. 614 (1928) (time to file appeal in Supreme Court does not begin till certification allowed). The South Cleveland Banking Company v. Nachtrieb, 24 Ohio C.C. (N.S.) 504 (1905) (motion to set aside judgment); Woodward v. Brockell, 2 Ohio App. 37 (1913) (order of re-reference); The American Bank v. Sethman, 25 Ohio App. 81, 157 N.E. 423 (1926) (motion to vacate foreclosure decree); Neighbors v. The Thistle Down Co., 26 Ohio App. 324, 159 N.E. 111 (1926) (motion to remove receiver); Friedman v. Brown, 35 Ohio App. 450, 172 N.E. 565 (1930) (motion to change date of judgment entry); Eaton v. Robison, 47 Ohio App. 436, 192 N.E. 132 (1933), *aff'd*, 127 Ohio St. 587, 190 N.E. 249 (1934) (order confirming sale and distribution by receiver); The Equity Savings & Loan Co. v. Schwartz, 57 Ohio App. 392, 14 N.E. (2d) 359 (1937) (motion to vacate foreclosure decree); Andrews v. Ackerman Coal Co., 59 Ohio App. 65, 17 N.E. (2d) 247 (1937) (rehearing order granting new

New Trial as "Necessary or Proper Procedure"

The second approach of the *Longman* case is whether a motion for new trial is "proper [or] authorized . . . in the circumstances" or "necessary or proper procedure."[39] Since a new

trial); The J. & F. Harig Co. v. City of Cincinnati, 61 Ohio App. 314, 22 N.E. (2d) 540 (1938) (second motion for judgment on pleadings); Sullivan v. Cloud, 62 Ohio App. 462, 24 N.E. (2d) 625 (1939) (judgment vacated after appeal); Tracy-Wells Co. v. McKay, 26 Ohio L. Abs. 507 (1938) (overruling motion for new trial filed too late). But under circumstances where justice demands it a motion in the nature of an application for rehearing will delay the time to appeal. The Propeller Ogontz v. Wick, 12 Ohio St. 333 (1861) (motion to reinstate appeal); Geiger v. The American Seeding Machine Co., 124 Ohio St. 222, 177 N.E. 594 (1931) (leave to file amended pleadings on court's own motion), (1931) 5 U. Cin. L. Rev. 502; Baldwin v. Lint, 53 Ohio App. 349, 5 N.E. (2d) 413 (1936) (motion to vacate summary judgment granted while attorney away); *see* Wilder v. McDonald, 18 Ohio C.C. 232, 233 (1899), *aff'd*, 63 Ohio St. 383, 59 N.E. 106 (1900) (time for appeal delayed if judgment modified or set aside); *cf.* Rules of Practice of The Courts of Appeals of Ohio (1936) Rule XI; Central National Bank v. Mills, 33 Ohio L. Abs. 169 (1940); Horth v. American Aggregates Corp., 20 Ohio Op. 76 (C. of A. 1940).

[39] The *Longman* case has been described as follows: "The privilege of filing same [motion for new trial] is one which may not be denied, if the motion may serve any useful purpose. If it does not serve a useful purpose, it is wholly unavailing to extend the period for filing a notice of appeal." The Western Union Telegraph Co. v. The Dixie Terminal Co., 59 Ohio App. 305, 17 N.E. (2d) 954 (1938) at p. 307. "When the motion involves merely iteration of a legal right fully preserved by previous action, it becomes superfluous and unnecessary and the [rule of the *Longman* case applies]. The action on the superfluous motion being unavailing to toll the limitation provided for the notice of appeal, the appeal is dismissed." The J. & F. Harig Co. v. City of Cincinnati, 61 Ohio App. 314, 22 N.E. (2d) 540 (1938) at p. 320. "In this respect the instant case must be distinguished from [the *Longman* case], wherein it was determined that the filing of a motion for a new trial following a judgment which sustained a demurrer was neither *necessary nor proper*, because there had been no trial upon any *issue of fact*." The State, *Ex Rel.* Squire v. Winch, 62 Ohio App. 161, 23 N.E. (2d) 642 (1939) at p. 162. The essence of the *Longman* case "lies not in the course of its discussion of what should control, but lies in what it terms 'our conclusions'," that the *Craig* and *Wells* cases govern. The First National Bank v. The Kittoe Boiler & Tank Co., 62 Ohio App. 411, 24 N.E. (2d) 458 (1939) at p. 412 "The principal case, in view of the language of the opinion, makes these two earlier cases applicable [*Craig* and *Wells* cases] under the New Appellate Practice Act and establishes the rule that the filing of a motion for a new trial stays the time for filing of the notice of appeal only, as was said in the *Wells* case, when the motion for a new trial prevents

trial by statutory definition "involves a reexamination of an *issue of fact* in the same court after trial" and since in the present case the demurrer "challenged merely the legal sufficiency of the pleadings," there having been "no trial on any issue of fact," the motion for new trial in that case was neither necessary nor proper procedure. Although the query may be raised—whether the crucial fact was that there had been no trial or that there had been no issue of fact—the latter is what the Court had in mind, since a trial—"a judicial examination of the issues, . . . of law . . ., in an action . . ." had been had and the Court in redefining a new trial stressed the words "an issue of fact."[40]

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the entry of judgment. That situation, by virtue of Section 11599 General Code, only occurs in jury cases, and in all other cases, the time for filing an appeal begins to run from the journalizing of the judgment or decree in the lower court." Hart and Hart, *Review of Ohio Case Law for 1938* (1939) 13 Ohio Op. 340 at p. 355. "The facts in the[*Longman* case] are so dissimilar that we do not consider it controlling. There was in fact no trial and no motion for a new trial in that case." The Liberal Savings & Loan Co. v. The Frankel Realty Co., 64 Ohio App. 97, 28 N.E (.2d) 367 (1940) at p. 102. "We . . . find the [*Longman* case] pertinent and determinative." Mandevers v. Peerless Stove & Mfg. Co., 28 Ohio L. Abs. 255 (1938) at p. 256 (motion to arrest from jury and for judgment on pleadings and opening statement). "There could have been no necessity of the reconsideration of the determination of the facts [in the *Longman* case] because there was no dispute, the cause having been submitted on an agreed statement of facts. The only question before the court was the correctness of the application of the law to the conceded facts and issue of law only. In this situation there was no place for motion for new trial in the view which our Supreme Court has heretofore taken of the place and purpose of such a motion." Anderson v. Local Union No. 413, 29 Ohio L. Abs. 364 (1939) at p. 369. "Thus it must be emphasized that a very real difference exists between the cases in which a mere question of law is presented by the record as upon a demurrer . . . and those cases in which 'an issue of fact' within the meaning of Section 11575 is subject to re-examination." Stevens, *Observations on the Appellate Procedure Act* (1939) 12 Ohio Bar 491 at p. 502. The Supreme Court passed final judgment on the effect of the *Longman* case by saying: "However, this view [that the rule of the *Longman* case applies] disregards the distinguishing feature that in the [*Longman* case] there concededly was no trial on any issue of fact whatsoever. The demurrer of course presented a question of law alone." Cullen v. Schmit, 137 Ohio St. 479, 30 N.E. (2d) 994 (1940) at p. 482.

[40] Ohio Gen. Code, Sec. 11376—"A trial is a judicial examination of the issues, whether of law or of fact, in an action or proceedings." Section 11575—"A new trial is a re-examination, in the same court, of an issue of

This line of reasoning induced the Court of Appeals in *Man-*

fact, after a verdict by a jury, a report of a referee or master, or a decision by the court." *But cf.* 55 Ohio Laws 81 (1858) (second trial as of right in place of appeal), *repealed*, Rev. Stat., Sec. 1753 (1880). Section 11377—"Issues arise on the pleadings where a fact or a conclusion of law, is maintained by one party and controverted by the other. They are of two kinds: (1) Of law. (2) Of fact." Section 11378—"An issue of fact arises: (1) Upon a material allegation in the petition denied by the answer. (2) Upon a set-off, counterclaim, or new matter, presented in the answer and denied by the reply. (3) Upon material new matter in the reply, which is to be considered as controverted by the adverse party without further pleading." Section 11303 "The only pleadings in civil actions are: . . ." petition, answer (cross-petition), reply, and demurrer to any one of the above. Section 11370—"A motion is an application for an order, addressed to a court or judge, by a party to a suit or proceedings, or one interested therein." Section 11237—"An action is an ordinary proceeding in a court of justice, involving process, pleadings, and ending in a judgment or decree, by which a party prosecutes another for the redress of a legal wrong, enforcement of a legal right, or the punishment of a public offence." Thus a motion for new trial made and overruled is not necessary to review evidence heard at a special proceeding commenced by affidavits instead of pleadings because not a trial, as pointed out in Minnear v. Holloway, 56 Ohio St. 148, 154, 46 N.E. 636, 637 (1897). Phelps v. Schroder, 26 Ohio St. 549 (1875) (election contest); The Pittsburgh, Cleveland & Toledo Railroad Company v. Tod, 72 Ohio St. 156, 74 N.E. 172 (1905) (preliminary question in appropriation proceeding); The Dayton & Union Railroad Company v. The Dayton & Muncie Traction Company, 72 Ohio St. 429, 72 N.E. 195 (1905); Charles Beitman & Co. v. McKenzie, 9 Ohio Dec. Repr. 403 (1884), *aff'd*, 17 Ohio L. Bull. 405 (1887) (motion to discharge attachment); Mercantile Trust Company v. Etna Iron Works, 4 Ohio C.C. 579 (1890) (to set aside appointment of temporary receiver); Stone v. Bank, 8 Ohio C.C. 636 (1894) (to dissolve attachment); Acomb v. Clark, 16 Ohio C.C. 662 (1898) (dismissal for want of jurisdiction); Thomas v. Mangus, 2 Ohio C.C. (N.S.) 554 (1904) (attachment); Cecil v. Grant, 6 Ohio C.C. (N.S.) 65 (1905); Schottenfels v. Massman, 16 Ohio App. 78 (1921) (motion to strike petition); Snyder v. The New York, Chicago & St. Louis Rd. Co., 24 Ohio App. 514, 157 N.E. 427 (1927), *aff'd*, 118 Ohio St. 72, 160 N.E. 615 (1928), *aff'd*, 278 U.S. 578, 49 S. Ct. 176 (1929) (appropriation proceedings); Slater v. Brown, 43 Ohio App. 497, 183 N.E. 393 (1932) (motion to vacate judgment, time to file bill of exceptions not extended); Fairbanks, Morse & Co. v. Hill, 48 Ohio App. 418, 194 N.E. 397 (1934) (motion for costs); Laub v. The Warren Guaranty Title & Mortgage Co., 54 Ohio App. 457, 8 N.E. (2d) 258 (1936) (motion to confirm sale of realty on mortgage foreclosure); Hoffman v. Weiland, 64 Ohio App. 467, 29 N.E. (2d) 33 (1940) (order in aid of execution). But occasionally a motion for new trial has been held necessary to review the evidence in special proceedings. Snyder v. Wanamaker, 17 Ohio C.C. 184 (1898) (motion to set aside settlement of action); Whitman v. Sheets, 20 Ohio C.C. 1 (1899) (motion to quash service); Meachem v. Meachem, 11 Ohio L. Abs. 147 (1931) (motion for temporary alimony).

devers v. Peerless Stove & Mfg. Co.[41] to make the distinction as to the propriety of a motion for new trial between the situation where a question of fact and a question of law was involved in the first trial. There the petition in an action at law was defective, but was not attacked by demurrer. The case having proceeded to trial, a jury having been impaneled, counsel for plaintiff having made his opening trial statement, and some preliminary testimony having been introduced, an oral motion was interposed to arrest the case from the jury and to render judgment in favor of defendant upon the pleadings and such opening statement. The trial court sustained the motion to dismiss the petition, the entry being journalized. A motion for new trial was overruled three months later and notice of appeal was filed the same day. The *Longman* case was held controlling. The court in the *Cullen* case may further this solution in pointing out therein that "at the conclusion of the trial the court arrested the evidence from the consideration of the jury and rendered a judgment for the defendants on the theory that as a matter of law the plaintiff is not entitled to recover

[41] 28 Ohio L. Abs. 255 (1938). The report of the case reads that the motion for new trial was filed March 1, while the journal entry was dated March 30. Presumably April 1 is meant. Although the appeal was here dismissed as not having been filed in time, the court, pointing out that the petition did not state a cause of action, in effect decided the case on the merits. The query may be raised as to whether the same procedural rule would have been followed if granting the motion for judgment below had been error. This case is subject to several interpretations. (1) The one assumed herein is that the motion testing the legal sufficiency of the plaintiff's case on the petition and opening statement presents to the court only an issue of law as opposed to an issue of fact, no matter when raised during the trial. (2) But the court may have felt that no trial begins before introduction of evidence *by plaintiff* to make a trial, if granted on motion, a "new trial." (3) Although a first trial may have here begun, the court declaring that the opening statement did not aid the petition may have considered that the trial was only a hearing on demurrer, exactly like the *Longman* case. (4) Or an issue of fact can occur only when the facts are taken, not from the petition or opening statement, but from evidence actually introduced. (5) The last view is that a re-examination of an issue of fact on motion for new trial can occur only when the disputed issues of fact have actually been resolved by the trier thereof at the first trial.

from the defendants upon the evidence in the record. However [by her motion for new trial] the plaintiff asks a reexamination of the facts as well as the law, and one of her assignments of error involves the admission and exclusion of evidence . . [which errors rendered the facts] not correctly portrayed by the present record." The implication was thereby raised that a motion for new trial seeking a reconsideration only of the ruling of the court in arresting the evidence from the jury and rendering judgment might not have been "duly filed."[42] *The State*, Ex

[42] This implication leads to one possible, but limited meaning of "necessary"—"duly filed" as "necessary" to save errors alleged for appellate review. The "necessary or proper procedure" test of the *Longman* case, re-emphasized by the words of the Court of Appeals in The State, *Ex Rel.* Squire v. Winch, 62 Ohio App. 161, 23 N.E. (2d) 642 (1939), that in the *Longman* case a motion for new trial "was neither *necessary nor proper*, because there had been no trial upon any *issue of fact*" raises the question whether a motion for new trial will toll the statutory period for review only in those situations where such motion is a prerequisite to raise on appeal alleged errors, grounds for such motion. When such is not the case, the motion may be considered merely a dilatory tactic, a matter of form, serving no useful purpose, and hence not "necessary procedure" to delay the time for appellate review. The test of the *Cullen* case, where "a motion for a new trial is duly filed only when, if granted, it would result in a reexamination of the issues of fact presented by the pleadings" may mean to distinguish the situation when at the first trial such issues were actually resolved by the trier of facts and when, although the first trial was to settle disputed issues of fact, judgment was entered, not on the facts as found by the trier, but as assumed for the purpose of testing the legal sufficiency of plaintiff's or defendant's case to date. In other words, no re-examination of issues of fact can result on granting a motion for new trial unless such issues were once "examined"—actually resolved—by a trier of fact instead of being taken from such trier and found in some other way for the purpose of applying the law thereto. Hence a trial ending, not in a finding of disputed factual issues, but in verdict and judgment as a matter of law, is not such an examination of "the issues of fact presented by the pleadings" that the trial granted after a hearing upon motion for new trial could be called a "reexamination" thereof. *Cf.* Cullen v. Schmit, 137 Ohio St. 479, 30 N.E. (2d) 994 (1940) at 481-2; Mandevers v. Peerless Stove & Mfg. Co., 28 Ohio L. Abs. 255 (1938); *See* Stevens, *Observations On the Appellate Procedure Act* (1939) 12 Ohio Bar 491, 502 (distinction between question of law and question of fact as basis for effectiveness of motion for new trial to delay time for appeal). In general when the appellate court is asked to review the facts on the weight of the evidence, the trial court must have been likewise requested in a motion for new trial, but, when an application of law to facts is reviewed on appeal, such motion in the trial court is unnecessary. Hence a motion for new trial may be "duly filed" only when "necessary"

Rel. *Longman v. Welsh* was distinguished on the ground that no trial was there had on any issue of fact, the demurrer presenting "a question of law alone," the Court thus stressing the absence of an issue of fact, not the absence of any trial.

The approach of the *Cullen* case in answering the question of when a motion for new trial is "duly filed" appears to be the

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to save errors for review. Thus to review a verdict, report, or decision resolving disputed factual issues on the weight and sufficiency of the evidence, a motion for new trial designating ground 6 of Section 11576 must have been overruled. Kepner's Administrator v. Snively's Administrator, 19 Ohio 296 (1850); Westfall v. Dungan, 14 Ohio St. 276 (1863); Ide v. Churchill, 14 Ohio St. 372 (1863); Hoffman v. W. Y. M. Gordon & Bro., 15 Ohio St. 211 (1864); Randall v. Turner, 17 Ohio St. 262 (1867); Turner v. Turner, 17 Ohio St. 449 (1867); Spangler v. Brown, 26 Ohio St. 389 (1875); Everett, Weddell & Co. v. Sumner, 32 Ohio St. 562 (1877); Union Insurance Company v. McGookey, 33 Ohio St. 555 (1878); Railroad Company v. Kassen, 49 Ohio St. 230, 31 N.E. 282 (1892); The State, *Ex Rel.* Porter v. Clark, 112 Ohio St. 133, 146 N.E. 815 (1925); Emery v. City of Toledo, 121 Ohio St. 257, 167 N.E. 889 (1929); Chapek v. The City of Lakewood, 11 Ohio App. 203 (1919); Rowe v. Rowe, 16 Ohio App. 180 1922); Cox v. Cox, 34 Ohio App. 192, 170 N.E. 592 (1929); Murray v. Brown, 46 Ohio App. 136, 188 N.E. 15 (1933); Gearhart v. Columbus Ry., Power & Light Co., 65 Ohio App. 225, 29 N.E. (2d) 621 (1940); *cf.* Deveraux v. Hutchinson, 21 Ohio C.C. (N.S.) 462 (1907), *aff'd*, 78 Ohio St. 415, 85 N.E. 1124 (1908) (motion for new trial needed to review special findings of fact even though general verdict rendered for appellant). An appeal on questions of law being allowed from a chancery case, Stuckey v. The New York, Chicago & St. Louis Rd. Co., 58 Ohio App. 14, 15 N.E. (2d) 975 (1937), to review the evidence here a motion for new trial made and overruled is likewise necessary. Turner v. Turner, *supra;* Spangler v. Brown, *supra.* To hold that a motion for new trial here would not delay the period for review would result, when none is filed, either in limited review or no review at all where the factual finding is the only error claimed. A motion for new trial overruled is likewise required to re-examine on appeal factual findings, even when no conflict in the evidence exists, since minds may differ in the ultimate finding, consisting of inferences drawn from such evidence. The Bank of Virginia v. The Bank of Chillicothe, 16 Ohio 170 (1847); Spangler v. Brown, *supra;* Chapek v. The City of Lakewood, *supra* (applied when verdict directed for defendant). Even though only one inference is possible from the testimony of undisputed witnesses, because the trier of fact may have disbelieved them, a motion for new trial is also needed here to review the factual findings. Werk v. Voss, 8 Ohio Dec. Repr. 205 (Dist. Ct. 1881). But to draw a distinction for purposes of computing time for appeal between findings of fact and conclusions of law would be unfortunate because of the shadowy line between them. *Cf.* The C. L. & N. Railway Co. v. Kellsall, 6 Ohio N.P. (N.S.) 487 (Sup. Ct. 1908), *aff'd*, The Cincinnati,

"proper procedure" test, for filing such motion in accordance with the statutory definition certainly must be authorized or proper. Such approach is the logical one of finding out the nature of such motion as defined elsewhere in the Code, Section 11575. But along with an examination of this statutory definition several other sections of the Code should also be examined

Lebanon & Northern Railway Co. v. Kelsall, 82 Ohio St. 388, 92 N.E. 1110 (1910). Furthermore, other types of error, grounds for new trial, must be considered upon motion for new trial to preserve them for review. Hills v. Ludwig, 46 Ohio St. 373, 24 N.E. 596 (1889) (request for charges refused); *see* The Toledo & Ohio Central Railway Co. v. Marsh, 17 Ohio C.C. 379, 383 (1898) (excessive damages, refusal to charge). To be contrasted with review on the weight of the evidence, presenting "issues of fact" are the instances where a motion for new trial overruled is not necessary for appellate review. Thus where no evidence exists fairly tending to establish facts, the existence of which are essential to make out a cause of action or defense and raising an error of law for want of proof, The Travelers' Indemnity Co. v. The M. Werk Co., 33 Ohio App. 358, 169 N.E. 584 (1929); *see* Turner v. Turner, 17 Ohio St. 449, 452 (1867); The Western Ohio Ry. Co. v. Fairburn, 99 Ohio St. 141, 142, 124 N.E. 131 (1918) (weighing evidence as against no evidence distinguished); *cf.* The Medina County Mutual Fire Insurance Company v. Palm, 5 Ohio St. 107 (1855). When the court makes a finding of fact separately from conclusions of law, Lockwood v. Krum, 34 Ohio St. 1 (1878); Miller v. Douglas, 13 Ohio C.C. 439, 14 Ohio C.C. 14 (1897), the reason being that the question involved, whether the conclusions of law follow from the facts as found as an application of law to facts, is a question of law. The Cincinnati Gas & Electric Company v. Archdeacon, 80 Ohio St. 27, 88 N.E. 125 (1909); State v. Wirick, 81 Ohio St. 343, 90 N.E. 937 (1910); Luntz v. Stern, 135 Ohio St. 225, 20 N.E. (2d) 241 (1939); Yahraus v. Stevens, 29 Ohio L. Rep. 81 (1929). When the record contains an agreed statement of facts, H. W. Brown & Co. v. D. W. Mott & Brothers, 22 Ohio St. 149 (1871); McGonnigle v. Arthur, 27 Ohio St. 251 (1875); In Matter of Estate of Hinton, 64 Ohio St. 485, 60 N.E. 621 (1901); Bettman v. Northern Insurance Co., 134 Ohio St. 341, 16 N.E. (2d) 472 (1938). Likewise the granting or refusing to grant a motion for directed verdict, to declare a nonsuit, to arrest the evidence from the jury and for judgment, or for judgment upon the pleadings or pleadings and opening statement, or a demurrer to the evidence presents questions of law. The Jacob Laub Baking Co. v. Middleton, 118 Ohio St. 106, 160 N.E. 629 (1928); Inglish v. Industrial Commission, 125 Ohio St. 494, 182 N.E. 31 (1932); Klein v. Realty Board Investors, Inc., 48 Ohio App. 235, 192 N.E. 867 (1934); Oster v. The Columbian National Fire Insurance Company, 29 Ohio L. Rep. 239 (1929); *cf.* Cornell v. Morrison, 87 Ohio St. 215, 100 N.E. 817 (1912); Durbin v. The Humphrey Co., 133 Ohio St. 367, 14 N.E. (2d) 5 (1938); Gerend v. City of Akron, 63 Ohio App. 78, 25 N.E. (2d) 363 (1939), *reversed on other*

to discover when a motion for new trial is authorized or "proper procedure" and hence "duly filed."

"Proper Procedure." Thus upon carrying this approach a step further a motion for new trial would seem to be "duly filed" when filed for any of the causes for which a new trial will be given by the trial court, as enumerated in Section 11576, for this is part of the privilege given to a party defeated at the

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grounds, 137 Ohio St. 527, 30 N.E. (2d) 987 (1940). This conclusion results from the process followed in passing upon such motions or demurrer and described in Ellis v. The Ohio Life Insurance and Trust Company, 4 Ohio St. 628 (1855) at 645-6, "When all the evidence offered by the plaintiff has been given and a motion for nonsuit is interposed, *a question of law* is presented, whether the evidence before the jury *tends* to prove all the facts involved in the right of action, and put in issue by the pleadings. All that the evidence in any degree *tends* to prove, must be received as fully proved.... The motion involves not only an admission of the truth of the evidence, but the existence of all the facts which evidence conduces to prove. It thus concedes to plaintiff everything that the jury could possibly find in his favor and leaves nothing but the question whether, as a matter of law, each fact indispensable to the right of action has been supported by some evidence." The degree of proof necessary, scintilla or sufficient so that the facts and reasonable inferences deducible therefrom are such that the jury as fair-minded men could reasonably arrive at different conclusions, makes no difference. *Cf.* Hamden Lodge No. 517 v. The Ohio Fuel Gas Co., 127 Ohio St. 469, 189 N.E. 246 (1934) (scintilla rule abolished), (1934) 33 MICH. L. REV. 136. Consequently a motion for new trial is not necessary in these cases to raise on review the alleged error. The Jacob Laub Baking Co. v. Middleton, *supra*; Inglish v. Industrial Commission, *supra*; Klein v. Realty Board Investors, Inc., *supra*; Oster v. The Columbian National Fire Insurance Company, *supra*; *see* Roadway Express, Inc. v. Fidelity & Guaranty Fire Corp., 52 Ohio App. 401, 411, 3 N.E. (2d) 805, 809 (1935). To predicate error on admission or rejection of evidence and on the charge or failure to charge a jury, no motion for new trial is needed. Earp v. The Pittsburgh, Fort Wayne and Chicago Railroad Company, 12 Ohio St. 621 (1861); Seagrave v. Hall, 10 Ohio C.C. 395 (1895); McAlpin v. Clark, 11 Ohio C.C. 524 (1896), *aff'd*, 56 Ohio St. 786, 49 N. E. 1112 (1897); *cf.* The State v. Langenstroer, 67 Ohio St. 7, 65 N.E. 152 (1902) (impaneling jury and introduction of testimony before justice of peace). *But cf.* Cullen v. Schmit, 137 Ohio St. 479, 30 N.E. (2d) 994 (1940) (motion for new trial on ground of admission and exclusion of evidence held "duly filed.") The *Cullen* case, furthermore, held that a motion filed on this ground is "duly filed" even when the first trial did not resolve disputed factual issues. Consequently this case is an exception to the rule suggested by the interpretation herein posed. Although this interpretation of "duly filed" in the light of the *Longman* case is conceivable, it is in addition too narrow and should not be adopted.

first trial.[43] In general these causes contemplate the situation where for some reason or other the one seeking to vacate a former verdict, report or decision has not received a fair trial, substantial justice not having been done.[44] Two of the statutory grounds in particular must be analyzed in the light of the implication of the *Cullen* case—a reconsideration of an issue of fact as compared to a reconsideration of an issue of law—in determining whether a motion for new trial is "duly filed." They are Section 11576 (6)—"That the verdict, report, or decision is . . . contrary to law" and Section 11576 (8)—"Error of law occuring at the trial and excepted to by the party making the application." In *Weaver v. The Columbus, Shawnee & Hocking Valley R'y Co.*[45] Judge Bradbury said of subdivision 6 of Section 11576 at p. 495:—

> "This ground that the 'verdict, report, or decision' is contrary to law is broad and comprehensive. It would seem to include any *error of law* committed by the trial court in the course of a trial prejudicial to the losing party." (italics supplied.)

In determining what causes for new trial fall within subsections 6 and 8, Ohio Gen. Code, Section 11564 should be considered as an analogous statute, since it contemplates the filing of a motion for new trial based upon certain objections therein specifically enumerated. Thus the pendency of a motion for new trial under this statute, listing as grounds of error the action of the court in giving and refusing to give certain special instructions, delays the time within which the bill of exceptions must be taken until overruling of such motion.[46] Likewise, where a motion for new trial assigned as error the

[43] *See* Weaver v. The Columbus, Shawnee & Hocking Valley R'y Co., 55 Ohio St. 491, 496, 45 N.E. 717, 719 (1896); The Dayton & Union Railroad Company v. The Dayton & Muncie Traction Company, 72 Ohio St. 429, 436, 74 N.E. 195, 197 (1905).

[44] *Cf.* Hinton v. McNeil, 5 Ohio 509 (1832).

[45] 55 Ohio St. 491, 45 N.E. 717 (1896).

[46] Cincinnati Street Railway Co. v. Wright, 54 Ohio St. 181, 43 N.E. 688 (1896).

sustaining of a motion to arrest the testimony from the jury and to render judgment for defendant, the bill of exceptions filed within the prescribed period after the overruling of a motion for new trial was in time.[47] Because such motion was not necessary as a basis for appeal and Section 11564 at that time prescribed as the commencement of the period the date of "the decision of the court where a motion for a new trial is not necessary," the court relied expressly on subdivision 6 of section 11576, "that the verdict, report, or decision . . . is contrary to law," as here authorizing a motion for new trial. In an appropriation suit a motion for new trial, specifying that the petitioner had no right to make the appropriation, that there was no necessity therefor, and that the court was without authority to impanel a jury was held to have been properly filed under subdivisions 6 or 8, since such a motion need not follow the exact language of the statute, if the causes enumerated are such as are embraced within the meaning of the statute.[48] Hence a bill of exceptions taken from the overruling of the motion was in time.[49] The *Cullen* case itself held that a motion for new trial

[47] Weaver v. The Columbus, Shawnee & Hocking Valley R'y Co., 55 Ohio St. 491, 45 N.E. 717 (1896); The Dayton & Union Railroad Company v. The Dayton & Muncie Traction Company, 72 Ohio St. 429, 74 N.E. 195 (1905) (motion for new trial in appropriation proceedings based on errors in rulings on evidence and verdict and judgment against "law of the case"); Rafferty v. The Toledo Traction Co., 19 Ohio C.C. 288 (1899), *aff'd*, 64 Ohio St. 607, 61 N.E. 1147 (1901); Little v. Rees, 23 Ohio L. Abs. 459 (1936).

[48] Reusch v. The Northern Ohio Traction & Light Company, 19 Ohio C.C. (N.S.) 1 (1912), *aff'd*, 89 Ohio St. 456, 106 N.E. 1074 (1914).

[49] *See also* 30 OHIO JURIS. (1933) 99-109; Fox v. The State, 34 Ohio St. 377 (1878) (verdict not responsive to whole indictment); Burke v. Bader, 114 Ohio St. 278, 151 N.E. 187 (1926) (jury disregarding issue made verdict contrary to law); *see* Bozzelli v. Industrial Commission, 122 Ohio St. 201, 209, 171 N.E. 108, 110 (1930) (sufficiency of petition can be challenged by motion for new trial that verdict is contrary to law); Horn v. Horn, 30 Ohio L. Abs. 349 (1938). Erroneously refusing to direct a verdict, a motion therefor not having been renewed at the close of all the evidence is not the basis for judgment, but is grounds for a new trial, that the verdict and judgment are contrary to law. The Cincinnati Traction Co. v. Durack, 78 Ohio St. 243, 85 N.E. 38 (1908); The City of Zanesville v. Stotts, 88 Ohio St. 557, 106 N.E. 1051 (1913); The Youngstown & Subur-

applying for a re-examination of the rulings of the trial court on the admission and exclusion of evidence is "duly filed."[50] Yet the admissibility of evidence involves questions of law and the court is asked to re-examine them by such motion. But "a reexamination of the issues of facts presented by the pleadings" results only if the motion is granted. The comparison between an issue of fact and one of law as the test of the propriety of a motion for new trial fails to distinguish between the question or issue presented to the court in deciding whether to grant the motion for new trial and the later question or issue presented on the new trial itself, if granted. The former is always a question of law, even when the ground is that the verdict or decision is against the weight of the evidence.[51] If the ground alleged is held to be well taken and a new trial accorded, the same question need not again be reconsidered at

ban Ry. Co. v. Fauk, 114 Ohio St. 572, 151 N.E. 747 (1926); Wehnes v. Schliewe, 47 Ohio App. 452, 192 N.E. 12 (1934). A motion for directed verdict here is now unnecessary. *See* 116 Ohio Laws 413 (1935), *amending*, Ohio Gen. Code Sec. 11601. *Cf.* Minnear v. Holloway, 56 Ohio St. 148, 153-4, 46 N.E. 636, 637 (1897); Chapek v. The City of Lakewood, 11 Ohio App. 203 (1919) (motion for new trial essential after directed verdict). The grounds for new trial under Section 11576 have been held not exclusive. Brenzinger v. The American Exchange Bank, 66 Ohio St. 242, 64 N.E. 118 (1902); Wagner v. Long, 133 Ohio St. 41, 11 N.E. (2d) 247 (1937). Erroneously granting a directed verdict in other states with new trial statutes like the one in Ohio has been held the basis for a motion for new trial. Darling v. The Atchinson, Topeka & Santa Fe Railway Company, 76 Kan. 893; 93 Pac. 612 (1907); Bottineau Land & Loan Company v. Hintze, 150 Iowa 646, 125 N.E. 842 (1910). Or erroneously denying such motion. Steele v. Werner, 83 P. (2d) 56 (Cal. App. 1938). *Contra:* Federal Land Bank v. Gross, 178 Ga. 83, 172 S.E. 227 (1933) (nonsuit granted).

[50] *Cf.* Sherer v. Piper, 26 Ohio St. 476 (1875); Masters v. The Cincinnati Traction Co., 16 Ohio App. 99 (1922). Errors in the charge or refusal to charge are the basis for such motion. White v. Thomas, 12 Ohio St. 312 (1861); The Pennsylvania Company v. Miller & Co., 35 Ohio St. 541 (1880); Shelb v. Swank, 57 Ohio App. 144, 12 N.E. (2d) 417 (1937); *see* Kline v. Wynne, Haynes & Co., 10 Ohio St. 223, 227 (1859). As is an erroneous verdict because of misapprehension of the jury. The General Convention v. Crocker, 7 Ohio C.C. 327 (1893); Schatzinger v. Boyd, 22 Ohio C.C. (N.S.) 514 (1907).

[51] *See* Ohio Gen. Code, Sec. 12223-1(2); Gilmore v. Dorning, 31 Ohio L. Rep. 588, 589 (1930). *But cf.* Werner v. Rowley, 129 Ohio St. 15, 193 N.E. 623 (1934).

the second or new trial because it has already been decided. At least such new trial is not granted for the purpose of reconsidering this question, but instead is to establish a new record, to re-examine the factual issues, and is essential because either disputed facts have not as yet been established or have been erroneously found by the first verdict of the jury, report of the referee, or decision of the court.

"Necessary Procedure." A new trial, being costly of time and money, is never given unless necessary. Hence, if granting one is the only way to correct the errors committed in the first trial and alleged on motion as grounds for a new trial, the motion, although not essential to lay a basis for appellate review, should be considered not only "proper" and "authorized," but "necessary" procedure in accordance with the rule of the *Longman* case.[52] Thus in the usual case where a motion for directed verdict is erroneously granted against plaintiff at the close of his or of all the evidence and judgment

[52] "Necessary" is used here not as a basis for appellate review, but to cure errors of the first trial. *See* The State, *Ex Rel.* Squire v. Winch, 62 Ohio App. 161, 162, 23 N.E. (2d) 642, 643 (1939) (motion "necessary" to have trial court grant new trial); *cf.* fn. 42, *supra.* Another possible meaning of "necessary" is "necessary" to perfect the bill of exceptions, especially under amended Ohio Gen. Code, Sec. 11564, when the court of appeals determines that an appeal on questions of law and fact can be heard on questions of law only. State *ex.* Everts v. Jackson, 23 Ohio L. Abs. 259 (1936) (not chancery case); State *ex.* Warner v. Smith, 23 Ohio L. Abs. 313 (1936); Schwenkel v. Schwenkel, 23 Ohio L. Abs. 321 (1936) (not chancery case and no appeal bond); Edward Wren Co. v. Retail Clerks Union Local No. 190, 28 Ohio L. Abs. 95 (1938) (no appeal bond); *see* Stevens, *Observations on the Appelate Procedure Act* (1939) 12 Ohio Bar 491, 502-3. But these cases seem to be restricted to situations where the alleged errors involved the weight of the evidence, to review which a motion for new trial made and overruled is essential. Furthermore Sec. 11564 expressly provides for perfecting a bill of exceptions when no motion for new trial is filed. Such motion will not delay the forty-day period to file when no trial of issues based on pleadings has been had. Slater v. Brown, 43 Ohio App. 497, 183 N.E. 393 (1932); *see* fn. 40, *supra.* A motion for new trial has been held not a prerequisite to filing a bill of exceptions, although no question of retaining an appeal under the proviso of Sec. 11564 was involved. State *ex* Van Buren Twp. Bd. of Ed. v. Oakwood City Bd. of Ed., 32 Ohio L. Abs. 378, 394 (1940).

is entered thereupon, a new trial, the constitutional[53] right accorded plaintiff to reach a jury, granted on motion either by the trial court or given on reversal and remand by the upper court, is the only way to cure the error.[54] This situation is one of an erroneous application of the law by the court, just as the jury after making findings of fact may erroneously apply the law thereto and thus necessitate, when facts are not *separately* found, a new trial on the ground that the verdict is "contrary to law." A motion for such new trial would in either case then be "duly filed" and hence delay the twenty-day period.

Two queries, however, are hereby raised. Although upon motion for directed verdict upon the pleadings and opening statement or upon the evidence offered by plaintiff the jury is directed to bring in a verdict,[55] upon the granting of other types of motions, raising the same question as to the legal sufficiency

[53] *See* Ohio Const. Art. 1, Sec. 5.

[54] In the argument following the assumption is made that Section 11599 does not apply. If it does, judgment cannot be entered until the overruling of the motion for new trial and the proviso of Section 12223-7 is unnecessary. Although Section 11599 may apply where a verdict is actually returned on the granting of defendant's motion for directed verdict, it does not delay entry of judgment where judgment is granted on motion without the form of a jury verdict, as was done in the *Cullen* case. Klein v. Realty Board Investors, Inc., 48 Ohio App. 235, 192 N.E. 867 (1934). *Contra:* Ross v. Pfeiffer, 29 Ohio L. Abs. 47 (1939). Such distinction was made in McCallan v. Lake Shore & Michigan Southern Railway Company, 5 Ohio C.C. (N.S.) 366 (1904) and Oster v. The Columbian National Fire Insurance Company, 29 Ohio L. Rep. 239 (1929). The entry of judgment may be delayed in a jury case after granting a motion for such judgment as a matter of law even though a jury is not used. When a verdict is directed, such seems to be the practice. *Cf.* The Peoples and Drovers Bank v. Craig, 63 Ohio St. 374, 59 N.E. 102 (1900); Strangward v. The American Brass Bedstead Company, 82 Ohio St. 121, 91 N.E. 988 (1910); Kasky v. Baltimore & Ohio Rd. Co., 23 Ohio App. 185, 155 N.E. 174 (1926); City of Cincinnati v. Board of Education, 63 Ohio App. 549, 27 N.E. (2d) 413 (1940). But Section 11599 may not compel this practice. *See* Webb v. The Western Reserve Bond & Share Co., 115 Ohio St. 247, 255, 153 N.E. 289, 291 (1926). Whether the statute does or does not apply should not be governed by the form in which defendant requests judgment as a matter of law in his favor.

[55] *Cf.* Neckel v. Fox, 110 Ohio St. 151, 143 N.E. 389 (1924); Czellath v. Schaub, 37 Ohio App. 232, 174 N.E. 599 (1930); Meizner v. Coblitz, 39 Ohio App. 20, 176 N.E. 692 (1930); *see* Lehman v. Harvey, 45 Ohio App. 215, 224, 187 N.E. 28, 32 (1933).

of plaintiff's case to date, no jury is needed or used to return a verdict upon which judgment is entered.[56] Into this class fall motions for judgment upon the pleadings, the pleadings and opening statement or upon the evidence alone, for non-suit, or to arrest the evidence from the jury and to render judgment, or a demurrer to the evidence, or objection to the introduction of any evidence because of insufficiency of the petition.[57] Here it is arguable that a motion for new trial is not "duly filed" within the definition of Section 11575 when, although a jury is impaneled to hear the case, no verdict is ever returned after which that motion may be filed. But a motion in such case is filed after the "decision by the court" as specified in Section 11575. It is like a non-jury case. The need for a new trial to cure the error involved in thus rendering judgment against plaintiff is equally as great. No distinction affecting the propriety of filing a motion for new trial should be grafted on the fortuitous circumstance of the form in which defendant chooses to test plaintiff's case and in which judgment is entered.

The second query is more difficult to answer. When can it be said that one trial of an issue of fact has been had so that a motion for new trial seeks a second or "new trial" within the meaning of Section 11575? When is a new, rather than the first, trial necessary? This problem is especially pertinent to the situation where the defendant is testing by motion the legal sufficiency of plaintiff's case, for this can be done at any time from the filing of the petition, by demurrer,[58] to a time even

[56] *Cf.*, Radebaugh v. Citizens Trust & Savings Bank, 26 Ohio N.P. (N.S.) 347 (C.P. 1925); Federal Land Bank v. Gross, 178 Ga. 73, 172 S.E. 227 (1933).

[57] *See* Luberger and Meier, *The Motion in Ohio Civil Procedure* (1930) 4 U. CIN. L. REV. 251, 271-72, 274-79; *cf.* Ohio Gen. Code, Sec. 11601 (motion for judgment on pleadings or evidence at any time); The Wabash Railroad Company v. Skiles, 64 Ohio St. 458, 60 N.E. 576 (1901) (sufficiency of petition tested by objection to introduction of any testimony); Rheinheimer v. The Aetna Life Insurance Company, 77 Ohio St. 360, 83 N.E. 491 (1907); Cullen v. Schmit, 137 Ohio St. 479, 30 N.E. (2d) 994 (1940) (arresting evidence from jury).

[58] Ohio Gen. Code, Sec. 11303 and 11309.

after the verdict, by motion notwithstanding the verdict.[59] The erroneous sustaining of a demurrer and entering of judgment or rendering of judgment upon the pleadings will be the grounds on appeal for remanding for the *first* trial of an issue of fact.[60] That a motion for new trial after dismissal of the petition on hearing on demurrer is not proper or authorized procedure is settled.[61] But how much further must the proceedings advance before the upper court in reversing for error intervening will remand for a new or second trial? Where should the line be drawn? If a trial has begun, it must have ended either in a verdict and judgment or decision from which an appeal is taken.[62] After such verdict or decision a motion for new trial is filed. Hence the granting of the motion will result in a new trial. The question then remains—When does a trial of an issue of fact begin?

A trial has been defined in almost as many different ways as there are situations which necessitate the defining of the term,[63] especially as to when it begins.[64] For example, for

[59] Ohio Gen. Code, Sec. 11601. The question can be raised for the first time on appeal.

[60] The Columbus Packing Co. v. The State, *Ex. Rel.* Schlesinger, 106 Ohio St. 469, 140 N.E. 376 (1922); Rhoades v. McDowell, 24 Ohio App. 94, 156 N.E. 526 (1927). *But cf.* Braun v. Pociey, 18 Ohio App. 370 (1923) (trial called "new").

[61] The State, *Ex Rel.* Longman v. Welsh, 133 Ohio St. 244, 13 N.E. (2d) 119 (1938).

[62] *See* Garden City Feeder Co. v. Commissioner, 75 F. (2d) 804, 806 (C.C.A. 8th, 1935).

[63] Railway Company v. Thurstin, 44 Ohio St. 525, 9 N.E. 232 (1886) (hearing on motion to dismiss as "trial" in statute requiring court to state facts upon which alleged errors and rulings during "trial" arise); Thompson v. Denton, 95 Ohio St. 333, 116 N.E. 452 (1917) (order fixing compensation of receiver as appealable under "trial of chancery cases" clause in constitutional jurisdiction of court of appeals); The State, *Ex. Rel.* Faber v. Jones, 95 Ohio St. 357, 116 N.E. 456 (1917) (same for motion in insolvency courts).

[64] State *Ex Rel.* Seney v. Toledo Gardeners Exchange Co., 65 Ohio L. Bull. 243 (N.D. Ohio 1920) (petition for removal to federal court as filed before "trial" in state court); State *Ex Rel.* Montana Central Railway Company v. District Court, 32 Mont. 37, 79 Pac. 546 (1905) (dismissal without prejudice of action before "trial").

purposes of review of "errors of law occuring at the trial" rulings on impaneling a jury were held embraced within the trial.[65] Viewed abstractly, since the Ohio General Code includes the sections on impaneling a jury under the Division on "Trial" and the chapter on "Conduct of the Trial,"[66] the trial might be said to commence as soon as the issues have been made up and the selection of the jury is about to begin. But something more must happen than the impaneling of a jury before a final, appealable order will be entered.[67] Nothing on the merits has been as yet decided. Then the next logical place where a trial may be said to begin is when the jury is sworn and ready to hear the case.[68] The opening statement coming thereafter would therefore be included within the trial.[69] Hence an erroneous granting of judgment after the opening statement, whether or not a jury is used to bring in the verdict upon which judgment is rendered, should be a proper ground for a motion for *new* trial, since a trial granted thereon could be called new, one trial already having been had.[70] It should not matter whether the facts upon which judgment is entered are taken from the evidence presented by plaintiff, assumed for purposes of the

[65] Hartnett v. State, 42 Ohio St. 568 (1885); Palmer v. State, 42 Ohio St. 596 (1885).

[66] *Cf.* Rules of the Court of Common Pleas of Cuyahoga County, Ohio (1940), 18 (rules regarding impanelling jury placed under "The Conduct of the Trial or Hearing").

[67] *Cf.* The Equitable Securities Co. v. McDonald, 14 Ohio App. 56 (1920); Sunshine v. The Euclid-105th Properties Co., 30 Ohio App. 151, 164 N.E. 539 (1928); The Long & Allstatter Co. v. Willis, 48 Ohio App. 366, 193 N.E. 774 (1934).

[68] *See* Ohio Gen. Code, Sec. 11420-1 (when jury is sworn, trial shall proceed in order following); *cf.* Ohio Gen. Code, Sec. 13442-8 (order of proceedings at criminal trial).

[69] *See* Wagner v. The State, 42 Ohio St. 537, 540-1 (1885); Thomas v. Mills, 117 Ohio St. 114, 119, 157 N.E. 488, 489 (1927); Eastman v. The State, 131 Ohio St. 1, 10, 1 N.E. (2d) 140, 144 (1936); The State v. Grisafulli, 135 Ohio St. 87, 91, 19 N.E. (2d) 645, 647 (1939); *cf.* The State v. Blair, 24 Ohio App. 413, 157 N.E. 801 (1927) (jeopardy will not attach till jury sworn).

[70] *Cf.* The Compton Price Piano Co. v. Stewart, 25 Ohio C.C. (N.S.) 270 (1913).

motion to be true, from the opening statement, or from the allegations of the petition alone. The erroneous judgment granted upon the pleadings immediately after the jury has been selected, sworn, and hence ready to hear the case will necessitate the process of impaneling another jury.[71] To draw the line after the opening statement has been heard as to when the trial begins is not logical when such statement can be waived. But when a judgment is erroneously entered on the pleadings before selection of a jury, the proper procedure is either to allow the filing of further pleadings or, if complete, to proceed to trial for the first time. A trial then could not here be called "new." When after error has been pointed out, a repetition of procedure, already experienced, is necessary to cure error involved, such repetition can be said to be a "new trial."[72]

Beginning the trial of an issue of fact at the point here indicated for purposes of testing the propriety of a motion for new trial also accords with the reasons underlying the statutory grant of the privilege. The surroundings making for a less studied, more hasty decision by the court, a re-examination of which "under circumstances more favorable to its deliberate consideration than attended the first investigation" is made possible by the motion for new trial, would seem to exist just as soon as the jury is sworn and ready to hear the case. Even a motion for judgment upon the pleadings alone would not receive then as careful consideration as a demurrer or such a

[71] *Cf.* The Davis Laundry & Cleaning Co. v. Whitmore, 92 Ohio St. 44, 110 N.E. 518 (1915); Tyler v. The Vistula Realty Co., 31 Ohio App. 1, 166 N.E. 240 (1929).

[72] A case could occur of a motion for judgment upon the pleadings erroneously granted after selection, but before swearing-in of the jury. To argue that a trial begins only after a jury is prepared to hear the case is logically inconsistent with the implication, arising from characterizing the selection of a jury the second time as the process of a new trial, that such selection the first time is a trial. But if no jury were originally picked, to select one does not have that repetitious quality that can be called "new," "second," or "again," as does the selection of another jury. The dilemma might be answered by declaring that starting to impanel a jury commences a trial, but that no second or new trial can be had unless enough has occurred in the first that something can be repeated in the second to give it that "second" or "new" quality. Whichever approach is followed, the result is the same.

motion made during the pleading stage, unless the case were continued. Although the reason for a motion for new trial might not exist in some cases, a specific rule applicable generally must be established to afford the certainty which rules of procedure demand.

When a jury is waived or not permitted, as in an action in equity, the swearing-in of a jury cannot be the time of the commencement of the trial. The court acting as trier of fact, the trial should by analogy commence when the court is ready to hear the evidence. Here defendant's motion in the nature of a directed verdict at the close of plaintiff's case presents, unlike the situation when the case is heard by jury, a question of fact, whether the evidence thus far preponderates in favor of plaintiff or defendant.[73] The same question is presented to the court, when although the case is being heard by a jury, cross motions for directed verdict are made at such time and without such request that the case go to the jury that the court thereby becomes trier of fact.[74] Necessarily these motions cannot be made until the trial has begun in that the jury has been impaneled, sworn, and is ready to hear the case.[75] To review this factual decision of the court a motion for new trial is necessary in accordance with the well settled rule as a basis to urge on appeal the assignment of error that such decision is against the weight of the evidence.[76]

[73] The Euclid Arcade Building Co. v. The H. A. Stahl Co., 99 Ohio St. 47, 121 N.E. 820 (1918); Kroger v. Clark, 52 Ohio App. 33, 2 N.E. (2d) 623 (1935); Young v. W. E. Hutton & Co., 7 Ohio Op. 191 (C. of A. 1936).

[74] First National Bank v. Hayes & Sons, 64 Ohio St. 100, 59 N.E. 893 (1901); Strangward v. The American Brass Bedstead Company, 82 Ohio St. 121, 91 N.E. 988 (1910); Industrial Commission v. Carden, 129 Ohio St. 344, 195 N.E. 551 (1935); The Buckeye State Building & Loan Co. v. Schmidt, 131 Ohio St. 132, 2 N.E. (2d) 264 (1936); *see* Note (1937) 11 U. Cin. L. Rev. 72.

[75] *Cf.* Strangward v. The American Brass Bedstead Company, 82 Ohio St. 121, 91 N.E. 988 (1910) (cross motions after pleadings read to jury).

[76] *See* fn. 42, *supra.* Furthermore the *Boedker* case is here applicable, being of necessity an action at law. Industrial Commission v. Baker, 13 Ohio L. Abs. 64 (1932), *reversed on merits,* 127 Ohio St. 345, 188 N.E. 560 (1933).

Thus far the situation considered has been one where, after a jury or court as trier of fact is prepared to hear the case on the issues of fact, the legal sufficiency of plaintiff's case, presented either on the petition alone, the pleadings and opening statement, or evidence alone, all questions of law, is tested on motion and erroneously found to be defective. The only way to cure the error involved is to grant plaintiff a new trial, either on motion in the lower court or on reversal and remand by the upper. But the "necessity" test breaks down where the reverse situation is presented, where at any time after trial has begun, the legal sufficiency of plaintiff's case thus far presented on the pleadings, opening statement, or evidence is tested on motion and erroneously found to be sufficient. In other words, the motion is denied and plaintiff is given the right to go to a jury, which returns a verdict in his favor. Then, if the overruling of such motion is found to have been errouneous, upon a motion for judgment notwithstanding the verdict under Ohio Gen. Code, Section 11601, the proper judgment can be immediately entered for defendant without the need for a new trial.[77] Prior to the amendment of Section 11601 in 1935,[78] however, the

[77] Whether a new trial is needed to cure the error intervening is illustrated by whether the upper court can on reversing enter the judgment which the lower court should have rendered. Minnear v. Holloway, 56 Ohio St. 148, 46 N.E. 636 (1897) shows that this power turns on whether there is a disputed factual issue. Compare Reiff v. Mullholland, 65 Ohio St. 178, 62 N.E. 124 (1901); Majoros v. The Cleveland Interurban Rd. Co., 127 Ohio St. 255, 187 N.E. 857 (1933); Greyhound Lines, Inc. v. Martin, 127 Ohio St. 499, 189 N.E. 244 (1934), with Hickman v. The Ohio State Life Insurance Company, 92 Ohio St. 87, 110 N.E. 542 (1915); Nyiry v. Modern Brotherhood, 92 Ohio St. 387, 110 N.E. 943 (1915); The Bridgeport Bank Co. v. The Shadyside Coal Co., 121 Ohio St. 544, 170 N.E. 358 (1930); Curry v. Manfull, 123 Ohio St. 118, 174 N.E. 248 (1930); Ohio Gen. Code, Sec. 11601 (no judgment on ground verdict against weight of evidence).

[78] 116 Ohio Laws 413 (1935). The amendment permits judgment notwithstanding the verdict to be rendered "upon the evidence received upon the trial," as well as "upon the statement in the pleadings" previously provided for. Magyar v. The Prudential Ins. Co., 133 Ohio St. 563, 15 N.E. (2d) 144 (1938); *see* Comment (1935) 34 MICH. L. REV. 93; *cf.* Note (1936) 10 U. CIN. L. REV. 481.

only remedy for this situation was to grant a motion for new trial,[79] which would make such motion here highly authorized and proper. But the short answer regarding the effect of a motion for new trial on the time to appeal in this situation is that following a jury verdict, Ohio Gen. Code, Section 11599 would prevent the entry of judgment until overruling of such motion. No appealable order could be entered until then and the time to appeal would run only thereafter.

In an action in equity, where Section 11599 would not apply to delay *ipso facto* the time to appeal, and also in a jury case where the court is trier of fact, the erroneous refusal to give judgment for defendant on motion at the close of plaintiff's evidence presents merely a question of the weight and sufficiency of such evidence to sustain the decision of the court to be urged on motion as grounds for new trial. Hence such motion would be clearly authorized and proper and even necessary to form the basis for review on appeal of this question of law. But where defendant's motion for judgment upon the pleadings, or pleadings and opening statement, or objection to the introduction of testimony because of insufficiency of the petition, should have been granted, a motion for new trial cannot allege insufficiency of the evidence to support the decision because none has been presented. Here when the court has erroneously overruled defendant's motion testing the legal sufficiency of plaintiff's case, a motion for judgment under Section 11601 would authorize the immediate rendering of judgment for defendant without the need of a new trial. Such statute, however, should not be held to preclude defendant from seeking a new trial for the same reason.[80] Furthermore, the case after

[79] The Wheeling & Lake Erie Ry. Co. v. Richter, 131 Ohio St. 433, 3 N.E. (2d) 408 (1936), *overruling*, Lehman v. Harvey, 45 Ohio App 215, 187 N.E. 28 (1933), *petition in error dismissed*, 127 Ohio St. 159 (1933), (1935) 39 Ohio L. Rep. 536, 9 U. CIN. L. REV. 67.

[80] A motion for new trial, that the verdict is contrary to law, should not be precluded by amended Section 11601. Alleging the insufficiency of the evidence to support the verdict and filed along with a motion for judgment under Section 11601, it is not only proper, but necessary to raise that error

such erroneous ruling proceeding further to trial, other grounds for a new trial would probably be present. A re-examination of issues of fact being requested after an examination of such issues already, the motion for new trial should be considered "duly filed" so that the twenty-day period is tolled during its pendency.[81]

To be distinguished from the situations just discussed where, although a trial on the facts has begun, the trial has ended in the disposition of the case as a matter of law, making it unnecessary for the jury or court to resolve the disputed factual issues involved, is the situation where because of an agreed statement of facts (or stipulation of counsel) no disputed issue of fact ever has been tried or decided because a dispute thereon no longer exists. Need neither to try originally an issue of fact nor to re-examine it in a new trial is present, for an erroneous application of law to those agreed facts can be cured in the trial court by re-applying the law thereto, a process which

upon review. Because of the difference in quantum of evidence required in each case prudent technique would require the filing of both of such motions. *Cf.* Davis v. Turner, 69 Ohio St. 101, 68 N.E. 819 (1903); Thompson v. Rutledge, 32 Ohio App. 537, 168 N.E. 547 (1929); Slicker v. Seccombe, 42 Ohio App. 357, 182 N.E. 131 (1931); Benning v. Schlemmer, 57 Ohio App. 457, 14 N.E. (2d) 941 (1937); Kelley v. Columbus Railway, Power & Light Co., 62 Ohio App. 397, 24 N.E. (2d) 290 (1928); *see* The Jacob Laub Baking Co. v. Middleton, 118 Ohio St. 106, 120, 160 N.E. 629, 633 (1928). *Cf.* Davis v. Turner, *supra;* The Chris Holl Hardware Co. v. The Logan Brick Supply Co., 84 Ohio St. 455, 95 N.E. 1144 (1911); The Hocking Valley Mining Co. v. Hunter, 130 Ohio St. 333, 199 N.E. 184 (1935); The Cincinnati Goodwill Industries v. Neuerman, 130 Ohio St. 334, 199 N.E. 178 (1935); Michigan-Ohio-Indiana Coal Assn. v. Nigh, 131 Ohio St. 405, 3 N.E. (2d) 355 (1936), (1937) 4 U. CIN. L. REV. 153; Hubbuch v. City of Springfield, 131 Ohio St. 413, 3 N.E. (2d) 359 (1936); Murphy v. The Pittsburgh Plate Glass Co., 132 Ohio St. 68, 4 N.E. (2d) 983 (1936), (1937) 8 Ohio Op. 24; Durbin v. The Humphrey Co., 133 Ohio St. 367, 14 N.E. (2d) 5 (1938) all showing that granting a new trial and refusal to direct a verdict or to let one stand constitute a final order. *Cf.* McClanahan v. Koviak, 62 Ohio App. 307, 23 N.E. (2d) 975 (1939) (does proviso of Section 12223-7 re-enact rule of this line of cases?)

[81] Throughout, the case where defendant is testing the legal sufficiency of plaintiff's case to date has been discussed. The same principles would be applicable where plaintiff is testing the legal sufficiency of defendant's affirmative defense.

does not necessitate a new trial of issues of fact. Hence a motion for new trial after judgment, where the court has merely applied the law to undisputed facts clearly established, whether the action be at law or equity, would not be authorized or proper and hence would not toll the period for review.[82] Some difficulty arises, however, in answering the subsidiary question whether an issue of fact may still exist where the record shows an agreed statement or stipulation. To make a motion for new trial improper because no issue of fact is present, the agreed statement or stipulation must contain all the *ultimate facts*, with nothing left for the court to do but to apply the law to them. If from such agreed statement inferences and conclusions may further be drawn as to the facts, the agreed statement or stipulation merely relieves the trier of fact of the duty of passing on the credibility and trustworthiness of the evidence, oral or documentary. Only the evidence is agreed upon, leaving the ultimate facts, some or all, still in issue.[83] A motion for new trial, if granted here, would be seeking a re-examination of these issues of fact within the meaning of the *Cullen* case.

Practice in the Federal Courts

By analogy the present practice in the Federal Courts[84]

[82] Conner v. Great Atlantic & Pacific Tea Co., 25 F. Supp. 855 (W.D. Mo. 1939); *cf.* Baker v. Frazier, 137 Ohio St. 479, 30 N.E. (2d) 994 (1940); *see* fn. 77 *supra*; *cf.* Ohio Gen. Code, Sec. 11420-14 and 11421-4.

[83] Compare The Bank of Virginia v. The Bank of Chillicothe, 16 Ohio 170 (1847), with Clinton Bank v. Ayres, 16 Ohio 282 (1847). Compare Spangler v. Brown, 26 Ohio St. 389 (1875), with McGonnigle v. Arthur, 27 Ohio St. 251 (1875). *Cf.* City of Cincinnati v. Anchor White Lead Co., 44 Ohio St. 243, 7 N.E. 11 (1886); Hickman v. The Ohio State Life Insurance Company, 92 Ohio St. 87, 110 N.E. 542 (1915); Vignola v. The New York Central Railroad Co., 102 Ohio St. 194 ,131 N.E. 357 (1921); The Celtic Building Ass'n v. Regan, 9 Ohio Dec. Repr. 364 (Dist. Ct. 1884). Schwartz v. The Sandusky County Savings & Loan Co., 65 Ohio App. 437, 30 N.E. (2d) 556 (1939) (application of Ohio Gen. Code, Sec. 11571 making bill of exceptions unnecessary where agreed statement of facts exists); *cf.* Thomas Emery's Sons v. Irving National Bank, 25 Ohio St. 360 (1874).

[84] *See New Federal Rules of Civil Procedure as Related to Judicial Procedure in Ohio* (1939) 13 U. Cin. L. Rev. 1, 129-134; *Symposium on the Movement for the Simplification of Legal Procedure* (1939) 15 Tenn. L. Rev. 511, 551-86.

regarding the effect of a motion for new trial upon the time to seek appellate review may be helpful. Rule 73 (a) of the Federal Rules of Civil Procedure provides:—

> "When an appeal is permitted by law from a district court to a circuit court of appeals and within the time prescribed, a party may appeal from a judgment by filing with the district court a notice of appeal. . . ."[85]

The Notes of the Advisory Committee on Rules tell us that this "rule continues in effect the statutes providing for the time for taking an appeal such as: U.S.C., Title 28. . . Sec. 230 (Time for making application for appeal)". The statute reads:

> "No appeal intended to bring any judgment or decree before a circuit court of appeals for review shall be allowed unless application therefor be duly made within three months after the entry[86] of such judgment or decree."[87]

Rule 59, pertaining to the motion for new trial, says nothing about the effect of such motion on the time to file a notice of appeal, but amalgamates the petition for rehearing of former Equity Rule 69 with the motion for new trial of Title 28 U.S.C., Section 391,[88] otherwise leaving the nature of a new trial and the grounds for which granted in accordance with the former law.[89]

Although no clue is given in these two rules and statutes to answer the problem of the effect of such motion upon the time for appellate review, the generalization is with safety

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[85] The Rules were effective September 16, 1938. Rule 86.

[86] *See* Rule 58. "Entry of Judgment."

[87] 26 Stat. 829 (1891), *amended by*, 43 Stat. 940 (1925), *amended by*, 45 Stat. 54 (1928).

[88] 36 Stat. 1163 (1911), *amended by*, 40 Stat. 1181 (1919), *amended by*, 45 Stat. 54 (1928).

[89] Rule 59 (a) *GROUNDS*. "A new trial may be granted to all or any of the parties and on all or part of the issues (1) in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States; and (2) in an action tried without a jury, for any of the reasons for which rehearings have heretofore been granted in suits in equity in the courts of the United States . . ." *See* Notes of Advisory Committee on Rules.

asserted that timely service of a motion for new trial under Rule 59 or for amended findings under Rule 52 (b) or presumably for a judgment notwithstanding the verdict under Rule 50 (b) suspends the time for appeal while the motion is pending.[90] Otherwise such time would be running, since, unlike the effect of Ohio General Code, Section 11599, the entry of judgment in actions at law in the federal courts is not stayed pending the disposition of a motion for new trial.[91]

The basis of the present practice, to compute the time for appellate review from the ultimate disposition of such motion, is *Brockett v. Brockett*[92] heard on motion to dismiss the appeal. To a final decree pronounced May 10th a petition to reopen was filed and referred during the same term. Upon report made thereon June 9th, the court refused to open its former decree. An appeal was taken from both orders. The Supreme Court held that although no appeal could be taken from the refusal to open the former decree, the matter resting in the sound discretion of the court below, yet the bond was an effective stay of execution because given within 10 days after final decree. The "decree of the 10th of May was suspended by the subsequent action of the court; and it did not take effect until the 9th of June. . . ." The appeal was taken and the bond given within ten days of this last date.[93] Thus in accordance with the New Rules

[90] *See* 3 MOORE'S, FEDERAL PRACTICE (1938) 3393; 3 PIKE AND FISCHER, FEDERAL RULES SERVICE (1940) 735.

[91] Rule 59 (b) TIME FOR MOTION. "A motion for a new trial shall be served not later than 10 days after the entry of the judgment. . . ." Rule 58. ENTRY OF JUDGMENT. "Unless the court otherwise directs, judgment upon the verdict of a jury shall be entered forthwith by the clerk; . . ." But under this rule on motion the court has granted a stay of entry of judgment pending disposition of defendant's motion for dismissal and for new trial. Voelker v. Delaware, L., & W. R. Co., 31 F. Supp. 515 (W.D.N.Y. 1939).

[92] 2 How. 238 (U.S. 1844).

[93] Although this case involved the question of whether the appeal was in time to stay execution, it is cited for the proposition that the time for seeking appellate review is likewise suspended. Cases following this rule are, Railroad Company v. Bradleys, 7 Wall. 575 (U.S. 1868); Memphis v. Brown, 94 U.S. 715 (1876); Texas & Pacific Railway Company v. Murphy, 111 U.S.

rendering applicable the former practice time for appellate review does not commence until denial of a motion for new trial.[94]

Under Title 28 U.S.C. Section 391 reading:—"All United States courts shall have power to grant new trials, in cases where there has been a trial by jury, for reasons for which new trials have usually been granted in the courts of law . . ."[95], made still applicable by the New Federal Rules, contrary to the present uncertainty in Ohio, a new trial is a "proper" remedy for plaintiff after nonsuit under Rule 41 (b)[96] has been granted against him.[97] Where a motion for directed verdict has erroneously been denied and judgment upon the verdict entered against the party moving for such directed verdict, a new trial would seem here also to be a proper remedy.[98]

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488 (1884); Aspen Mining and Smelting Company v. Billings, 150 U.S. 31 (1893); Voorhees v. John T. Noye Manufacturing Company, 151 U.S. 135 (1894); Kingman v. Western Manufacturing Company, 170 U.S. 675 (1898); United States v. Ellicott, 223 U.S. 524 (1912); Chicago, Great Western Railroad Company v. Basham, 249 U.S. 164 (1918); Morse v. United States, 270 U.S. 151 (1926); *cf.* Luckenbach Steamship Company v. United States, 272 U.S. 533 (1926); The Liberal Savings & Loan Co. v. The Frankel Realty Co., 64 Ohio App. 97, 28 N.E. (2d) 367 (1940) (dissent).

[94] Burke v. Canfield, 111 F. (2d) 526 (App.D.C. 1940); Reliance Life Ins. Co. v. Burgess, 112 F. (2d) 234 (C.C.A. 8th, 1940); Hawley v. Hawley, 114 F. (2d) 745 (App.D.C. 1940); *cf.* Neely v. Merchants Trust Co., 110 F. (3d) 525 (C.C.A. 3d, 1940); *see* Abruzzino v. National Union Fire Ins. Co., 35 F. Supp. 925, 926 (N.D.W.Va. 1940).

[95] A motion for a new trial is not essential to review the weight and sufficiency of the evidence in federal courts. Chicago Life Ins. Co. v. Tiernan, 263 Fed. 325 (C.C.A. 8th, 1920); *cf.* American Distilling Co. v. Wisconsin Liquor Co., 104 F. (2d) 583 (C.C.A. 7th, 1939) (motion for new trial not condition precedent for appeal); Conner v. Great Atlantic & Pacific Tea Co., 25 F. Supp. 855 (W.D.Mo. 1939) (no new trial given when facts clear and undisputed).

[96] Rule 47 (b) reads in part: "After the plaintiff has completed the presentation of his evidence, the defendant . . . , may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief."

[97] Southwell v. Robertson, 27 F. Supp. 944 (E.D.Pa. 1939), *Contra:* Federal Land Bank v. Gross, 178 Ga. 83, 172 S.E. 227 (1933).

[98] Rule 50 (b) RESERVATION OF DECISION ON MOTION. "Whenever a motion for directed verdict . . . is denied . . . , the court is

Although the federal courts have been liberal in holding that the filing of defective petitions or motions for rehearing or new trial postpones the time for appeal,[99] a motion or petition filed only for the purpose of affording an opportunity to perfect an appeal in time has no such consequence.[100] Furthermore, new emphasis has recently been placed upon a qualification to the general rule that filing a motion for new trial or petition for rehearing will suspend the time for appeal. This qualification is that to have such an effect the motion or petition must be "entertained"[101] and is also based upon the case of *Brockett v. Brockett*, although the nearest the Supreme Court there approached the doctrine was in pointing out with respect to the petition for rehearing that the lower "court took cognizance . . . and referred it to a master commissioner."[102] When

deemed to have submitted the action to the jury subject to a later determination of the legal question raised by the motion. Within 10 days after the reception of a verdict, a party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict; . . . A motion for a new trial may be joined with this motion, or a new trial may be prayed for in the alternative. If a verdict was returned the court may allow the judgment to stand or may reopen the judgment and either order a new trial or direct the entry of judgment as if the requested verdict had been directed. . . ." Compare Reliance Life Ins. Co. v. Burgess, 112 F. (2d) 234 (C.C.A. 8th, 1940), with Pruitt v. Hardware Dealers Mut. Fire Ins. Co., 112 F. (2d) 140 (C.C.A. 5th,1940); Pessagno v. Euclid Inv. Co., Inc., 112 F. (2d) 577 (App.D.C. 1940); Thompson v. Rutledge, 32 Ohio App. 537, 168 N.E. 547 (1929), and Benning v. Schlemmer, 57 Ohio App. 457, 14 N.E. (2) 941 (1937). Montgomery Ward & Co. v. Duncan, 311 U.S. 243 (1940), (1941) 54 HARV. L. REV. 694, 14 So. CALIF. L. REV. 198.

[99] Thomas Day Co. v. Doble Laboratories, 41 F. (2d) 51 (C.C.A. 9th, 1930) *cert. denied*, 282 U.S. 883 (1930); The Astorian, 57 F. (2d) 85 (C.C.A. 9th, 1932) (petition for libel treated as petition for rehearing); *cf.* Cambuston v. United States, 95 U.S. 285 (1877).

[100] Title Guaranty & Surety Company v. United States, 222 U.S. 401 (1912); Kiehn v. Dodge County, 19 F. (2d) 503 (C.C.A. 8th, 1927); Mintz v. Lester, 95 F. (2d) 590 (C.C.A. 10th, 1938); Fiske v. Wallace, 115 F. (2d) 1003 (C.C.A. 8th, 1940) (motion to amend filed after other side had taken appeal); *cf.* Mutual Benefit Health & Accident Ass'n v. Snyder, 109 F. (2d) 469 (C.C.A. 6th, 1940).

[101] Wayne United Gas Co. v. Owens-Illinois Glass Co., 300 U.S. 131 (1937), 5 GEO. WASH. L. REV. 908.

[102] *See* Texas & Pacific Railway Company v. Murphy, 111 U.S. 488, 489 (1884).

does the court from which the appeal is taken "entertain" a petition for rehearing was answered with reference to the specific situation of a bankruptcy case in *Wayne United Gas Co. v. Owens-Illinois Glass Co.*[103] There after the Circuit Court of Appeals had denied a petition for allowance of appeal from an original order dismissing a petition filed under Section 77 (b) of the Bankruptcy Act, prompt application in the District Court to vacate and for rehearing was made and granted. A supplemental petition under Section 77 (b) was then presented. The original and supplemental petitions were considered upon their merits and the court after hearing dismissed such petitions, making findings of fact and conclusions of law with respect thereto. There was no indication that the petition for rehearing was not made in good faith or that the court received it for the purpose of extending petitioner's time for appeal. No rights had intervened which would render it inequitable to reconsider the merits. No abuse of sound discretion in granting the motion and in reconsidering the cause existed. Even though the court reaffirmed its former action and refused to enter a decree different from the original one, the order entered upon rehearing was held appealable and the time for appeal ran from its entry. But "a defeated party who applies for a rehearing and does not appeal from the judgment or decree within the time limited for so doing, takes the risk that he may lose his right of appeal, as the application for rehearing, if the court refuse to entertain it, does not extend the time for appeal."

In *Bowman v. Loperena*,[104] involving an application for an extension under Section 74 of the Bankruptcy Act, the debtor filed a petition for rehearing to vacate an adjudication in bakruptcy. The district judge endorsed thereupon that the "petition having been 'seanonably presented' and 'entertained' by the above entitled court, permission to file" it was thereby granted. The petition for rehearing was heard. An opinion and

[103] 300 U.S. 131 (1937).

[104] 311 U.S. 262 (1940); *see In re* Cury, 34 F. Supp. 526, 528-9 (W.D.Va 1940) (rehearing and appeal time independent).

order denying it was rendered. The Supreme Court held that, although this petition for rehearing was filed out of time, the endorsement upon it by a judge of the lower court, the hearing held, and the opinion announced all demonstrated that it was entertained by the court and dealt with upon its merits. Hence until the order thereon, no final decision had been rendered sustaining the adjudication as against the debtor's attack.[105] But, when an application for leave to file a second petition for rehearing was denied, the pendency of such application did not suspend the time to seek a writ of certiorari.[106] When a petition or motion is not filed in time, the court has no power to permit it to be filed.[107] Conversely when a motion for new trial or petition for rehearing is filed within the time required and is based upon permissible grounds, it is filed as of right. The court should have no power but to "entertain" or consider it upon the merits so that during its pendency the time for appeal is suspended.[108] Hence the doctrine of "entertainment" should

[105] *Cf.* Carpenter, Babson & Findler v. Condor Pictures, Inc., 108 F. (2d) 318 (C.C.A. 9th, 1939) (endorsement on petition for rehearing—filed in good faith not for purpose of delay or extending time to appeal); Chapman v. Federal Land Bank, 117 F. (2d) 321 (C.C.A. 6th, 1941) (petition for rehearing "denied" and later "overruled" not "entertained").

[106] Gypsy Oil Company v. Escoe, 275 U.S. 498 (1927) (motion for leave must be timely and petition actually entertained); *cf.* Roemer v. Bernheim, 132 U.S. 103 (1889) (rehearing granted upon condition not complied with); Morse v. United States, 270 U.S. 151 (1926).

[107] Payne v. Garth, 285 Fed. 301 (C.C.A. 8th, 1922) (motion for new trial filed after term expired); *cf.* Rule 59(b) of New Federal Rules.

[108] Payne v. Garth, 285 Fed. 301 (C.C.A. 8th, 1922) (statute gives right to review of judgment in jury case by motion for new trial and no action or inaction of court can oust it of jurisdiction to entertain and determine this given right); *see* Larkin Packer Co. v. Hinderliter Tool Co., 60 F. (2d) 491, 493 (C.C.A. 10th, 1932); *cf.* Kingman v. Western Manufacturing Company, 170 U.S. 675 (1898); Southland Industries, Inc. v. Federal Communications Commission, 99 F. (2d) 117 (App. D.C. 1938) (petition for rehearing being matter of right, no leave to file required and Commission is without power to refuse to entertain it); Oritz v. Public Service Commission, 108 F. (2d) 815 (C.C.A. 1st, 1940). At p. 816 Judge Magruder wrote, "It may be that where the published rules of court allow the filing of a petition for rehearing within a stipulated time after entry of the judgment, a petition filed within that time will be regarded as 'entertained,' without more, on the ground that the court is bound to give consideration to a petition

give no further trouble under the New Federal Rules, when a motion for new trial is filed in accordance with Rule 59 as a matter of right.[109] The distinction between a motion filed as a matter of right and therefore "entertained" and one filed as a matter of grace on leave of court and not "entertained" until leave granted, is drawn in Rule 59 (b) where an exception to the ten-day period given to file the motion for new trial is "that a motion for a new trial on the ground of newly discovered evidence may be made after the expiration of such period and before the expiration of the time for appeal, *with leave of court obtained on notice and hearing and on a showing of due diligence.*" (italics supplied). Without the provision for "leave of court obtained" a motion for new trial could either be used in a dilatory manner as an extension of time for appeal[110] or would cause endless litigation as to when such motion, served beyond the ten-day period, has been "entertained."

This doctrine of "entertainment," as applied to Ohio practice, seems to raise the question as to when a motion for new trial filed within time is authorized or "proper procedure" and hence "duly filed." Thus a timely motion properly filed must be "entertained" by the court so that the time to appeal would be

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for rehearing the filing of which has been invited by its rule." But when the Supreme Court of Puerto Rico in its order denying the petition for appeal recited that the motion for rehearing "was denied . . . without a hearing or written opinion and therefore was not entertained by the court . . . , " this recital was not disregarded and the appeal was dismissed for lack of jurisdiction. Compare Geiger v. The American Seeding Machine Co., 124 Ohio St. 232, 117 N.E. 594 (1931), with Duncan v. The State, *Ex Rel.* Williams, 119 Ohio St. 453, 164 N.E. 527 (1928).

[109] This conclusion would permit a motion filed to an action at law or equity for any of the reasons heretofore available and served not later than ten days after entry of judgment. *Cf.* The Eldridge and Higgins Company v. Barrere, 74 Ohio St. 389, 78 N.E. 516 (1906) (motion for new trial filed in time must be considered on merits); Hoffman v. Knollman, 135 Ohio St. 170, 20 N.E. (2d) 221 (1939).

[110] *See* 3 MOORE'S, FEDERAL PRACTICE (1938) 3250-52 (to prevent use of motion for new trial to extend time to appeal); Nachod & United States Signal Co., Inc. v. Automatic Signal Corporation, 26 F. Supp. 418 (D. Conn. 1939), *aff'd*, 105 F. (2d) 981 (C.C.A. 2d, 1939); Theiss v. Owens-Illinois Glass Co., 1 F.R.D. 175 (W.D. Pa. 1940).

suspended during the pendency of such motion.[111] The chief help then, derived from an analysis of the practice under the New Federal Rules, is a perspective of the wide use of the motion for new trial, its nature, and the grounds for which a new trial is granted.

Conclusion

In advocating the application of Sections 11576 and 11564, expressly related to Section 11576 by the *Weaver* case, along with Section 11575, in determining the propriety of a motion for new trial a reconciliation of Sections 11564 and 11576 with Section 11575 in terms of statutory interpretation must be attempted. Thus, in harmonizing these sections to make a sensible, working procedure "issue of fact" in Section 11575— the definition of a new trial— seems to be used in the broad sense as a determination of the ultimate facts. But a general verdict or decision of the court does not include merely a finding of the ultimate facts. It involves also an application of law to those findings.[112] Hence, a motion for new trial will allege as grounds for a new trial whatever has caused the ultimate result, verdict or decision, to be erroneous, whether an erroneous finding of fact because of rulings during the trial or because of improper evaluating of the evidence or an erroneous application of law to those facts correctly found. The court in considering on motion these alleged grounds for new trial may or may not be re-examining the question involved. If the grounds alleged are the erroneous granting of a motion for directed verdict or judgment or rulings on evidence, the court will be reconsidering

[111] An analogy in Ohio practice is the distinction between appeal to the Supreme Court of Ohio as of right and "on leave first obtained" or not "without its leave" as provided in the Constitution of Ohio, Article IV, Section 2, and Ohio Gen. Code, Sec. 12223-29.

[112] It might be argued that a motion for new trial should not be filed after special verdict, since only facts have been found and not the application of law thereto unlike a general verdict. Hence the motion for new trial should not be filed until judgment is entered upon such special verdict. If the error alleged has arisen only in the second step, the application of law, the finding of fact being correct, a new trial would not be necessary to cure the error and hence not properly filed to delay the time for appellate review. *See* fn. 13, *supra.*

the issues involved. If the grounds are an erroneous finding of fact by verdict because against the weight of the evidence or an erroneous application of law thereto by the jury, the court will then be examining these issues for the first time. But whether an examination or re-examination, the issues presented to the court on the motion for new trial are always issues of law. "Reexamination" in the definition of "duly filed" in the *Cullen* case does not mean re-examination in considering the motion for new trial, but re-examination on the new trial itself, *if the motion is granted.* A trial originally having been had because facts were disputed, since the facts have not as yet been correctly determined, " a reexamination of the issues of fact presented by the pleadings" is necessary. But no need exists to reconsider there the question of law involved in the motion for new trial already granted.[113] Thus, where a motion for new trial is sought on the ground that a verdict has been erroneously directed for defendant or in some other way the case has been taken from the jury and judgment rendered for defendant, the court again passing upon the question of the legal sufficiency of plaintiff's case on a motion for new trial has a question of law to decide. But the new trial, if granted by deciding in favor of the moving party, here plaintiff, results in a re-examination of an issue of fact. If on the same evidence presented by plaintiff a motion for directed verdict or for judgment is made by defendant, although thereby an issue of law is presented, it need not be retried because a re-examination thereof has already occurred when the court was considering whether to grant the motion for new trial. The granting of such motion was a ruling upon that question of law and has resulted in a new trial of an issue of fact. Thus a motion for new trial is here "duly filed."

In summing up then, if a trial has begun which is to try an issue of fact, either before a jury or court, the ultimate facts

[113] Even though the same question of law is re-examined in the second trial, such new trial is primarily to resolve the disputed factual issues. Some of the confusion may be caused by the fact that a jury not only resolves such issues, but decides questions of law as well in applying the law to the facts.

being in dispute, even though such facts are determined other than by a resolution of that dispute by the trier of fact,[114] jury or court, (as in the case of a directed verdict or judgment on the pleadings and opening statement or evidence), an application to secure another hearing is one seeking an opportunity to try those same disputed factual issues after one attempt has resulted in some error intervening. Such an application fits the definition of Section 11575 as requesting a "re-examination, in the same court, of an issue of fact, after a verdict by a jury, a report of a referee or master, or a decision by the court." In all such cases the time to file a notice of appeal under the proviso of Section 12223-7 will not commence until the disposition of such motion for new trial, because the motion is here "duly filed" within the meaning of the pertinent sections of the Ohio General Code and the *Cullen* case.[115]

The rules of procedure should be clear, certain, and easy to apply. A specific rule should also fit logically into the whole scheme of procedure. It is with this purpose, to fit the proviso of Section 12223-7 into the analogous sections of the Ohio Code of Procedure as well as to enunciate a rule, clear, certain, fair, and easy to apply, that this analysis has been made. If, however, it helps to prevent confusion and diversity of opinion from arising out of the decision and opinion in the *Cullen* case similar to that which arose from the *Longman* case[116] it will have served some useful purpose.

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[114] *Cf.* Darling v. The Atchison, Topeka & Santa Fe Railway Company, 76 Kan. 893, 894, 93 Pac. 612, 612-13 (1907).

[115] A careful lawyer, however, in every case where it can be argued that a motion for new trial will not delay the time for appeal should either secure such prompt disposal of his motion that the twenty-day period has not yet run from the entry of judgment or should file his notice of appeal while the motion is pending in accordance with the rule of the *Liberal Savings & Loan Co.* case in an action in equity. A second notice after the overruling of the motion should, to avoid any argument that the first is premature, be filed, if the action is one at law to which Section 11599 is not applicable. *See* fn. 54, *supra.* The function of such lawyer is not ultimately to vindicate the remedial rights of his client in court, but to prevent the delay, expense, anxiety and uncertainty of litigation over such rights to the detriment of the substantive rights of his client.

[116] See the remarks of Herbert E. Ritchie in *The Status of the Rule of Judicial Precedent* (1940) 14 U. CIN. L. REV. 203, 252, 254-6.