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Supreme Court Opinion Contradicting the Scintilla Rule

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their own bootstraps. The effect of the decision denuded of its legal aspects is somewhat unfortunate, however, as its direct result is to determine the destructibility or indestructibility of a testamentary trust according to the ability or inability of the person threatening its destruction to bring himself within a class, the members of which might accomplish that purpose. The result is that the remedies of a beneficiary depend upon circumstances wholly fortuitous and under such circumstances it is debatable whether public policy would not be better served by permitting the living under the guidance of a court of equity to allocate in a manner most productive of the common good wealth which the dead have bestowed grudgingly and with reservations. Cases which seem contrary to the case under discussion have their basis in statutes declaring that policy.[10] It is submitted that the enactment of a statute which would permit the adjustment of the rights of beneficiaries under long term trusts to suit the needs of the beneficiaries and the economic changes during the period of the trust would be beneficial for many reasons only a few of which have been discussed in this paper.

GEORGE E. FEE.

A SUPREME COURT OPINION CONTRADICTING THE SCINTILLA RULE

The opinion of the supreme court in *Cleveland Railway Co.* v. *Kukucz*[1] cannot logically co-exist with the scintilla rule and, therefore, imperatively requires a re-examination of that troublesome doctrine and a deliberate choice between it and the case referred to.

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[10]The case of Wolf v. Uhlemann, 325 Ill. 165, 145 N. E. 334 (1927), which seems to accomplish the result contended for on behalf of the beneficiaries in the instant case rests upon the fact that the property which was the subject of the agreement was in reality intestate property because of the provision of the Illinois statute against the accumulation of income. ILL. REV. STAT., c. 30, sec. 153, p. 636. Metzner v. Newman, 224 Mich. 324, 194 N. W. 1008 (1923). While seemingly at variance with the instant case may be explained by the provisions of the Michigan Statutes. See Act of August 18, 1921. See *In re* Lacroix's Estate, 244 Mich. 148, 221 N. W. 165 (1928), justifying an agreement of settlement which invalidated a will by a consent verdict. See Shermann v. Warren, 211 Mass. 288, and MASS. GEN. LAWS (1921), c. 204, sec. 15.

[1]121 Ohio St. 468, 169 N. E. 564 (1929).

The plaintiff in the *Kukucz* case sought damages for injuries claimed to have resulted from the defendant's negligence. The latter denied the allegations of negligence and pleaded contributory negligence on the part of the plaintiff directly contributing to the injuries in question. At the close of the plaintiff's evidence the defendant moved for a directed verdict. This motion was overruled and the defendant thereupon went forward with its proof, calling numerous witnesses. At the close of all the evidence the defendant again moved for a directed verdict and this motion was granted. The plaintiff prosecuted error to the court of appeals, which reversed the trial court "for error in directing the verdict". The supreme court reversed the court of appeals and affirmed the trial court, saying:

"The record discloses that both parties offered evidence, but that the evidence offered by the defendant was not incorporated in the bill. The motion of the defendant for a directed verdict was made and sustained at the close of the evidence. What the proof offered by the defendant was, whether it countervailed the proof of plaintiff on the issue of negligence, or sustained its issue of contributory negligence, neither the Court of Appeals nor this Court has the means of knowing. The missing evidence may have fully sustained the Court's ruling in directing the verdict."

All of the members of the supreme court concurred in the opinion except Judge Robinson who did not participate.

It will be observed that the supreme court did not reverse the court of appeals because the plaintiff's own evidence entitled the defendant to a directed verdict, but reversed on the *sole* ground that the *defendant's* evidence, which was missing from the bill of exceptions, may have fully sustained the trial court's ruling. The clearest principles of logic compel the conclusion that the supreme court must have considered that the plaintiff had made at least a *prima facie* case, for if the court had been of the opinion that the plaintiff's evidence did not raise even a *scintilla*, the natural and reasonable and customary procedure would have been to reverse the court of appeals and affirm the trial court *on that ground*. If the plaintiff had not introduced "some evidence" there was no occasion to rest the decision upon the absence of *defendant's* evidence from the bill of exceptions. But the supreme court held that it could not pass on the propriety of the directed verdict *because* the defendant's evidence was not in-

corporated in the bill. The only rational inference is that the plaintiff's evidence was, in itself, sufficient to require submission to the jury.

Indeed, we are not left to inference, however compelling. The court has stated its position with great clarity:

"What the proof offered by the defendant was, whether it *countervailed the proof of plaintiff on the issue of negligence, or sustained its issue of contributory negligence,* neither the Court of Appeals nor this Court has the means of knowing. *The missing evidence may have fully sustained the trial court's ruling in directing the verdict.*" (Italics ours.)

Unless the plaintiff's evidence had raised at least a *scintilla* there was nothing to *countervail,* and no occasion to inquire whether the issue of contributory negligence had been sustained. It follows necessarily that the plaintiff must have introduced "some evidence". There is simply no escape from that conclusion.

In this connection it is pertinent to observe that in two previous trials the plaintiff had obtained a verdict from the jury. One of these verdicts was set aside by the trial court as being against the *weight* of the evidence, indicating that he, too, considered that the plaintiff had introduced "some evidence",[2] for if there had not been at least a *scintilla* there was, beyond question, nothing to *weigh.* In another trial the jury returned a verdict for the defendant upon which judgment was entered. This was reversed and the case remanded by the court of appeals "for error in the charge of the court, no other error appearing in the record". It would seem, therefore, that the court of appeals considered that the plaintiff had introduced "some evidence"—otherwise (1) the error in the charge could not have been the *only* error, and (2) in any event the plaintiff could not have been prejudiced by the charge, no matter how erroneous.

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[2]His written opinion concluded as follows:

"All in all, the Court cannot reconcile this verdict with the weight of the evidence. The Court, however, does want the entry in the case to affirmatively show that the ground for sustaining the motion for a new trial is that the verdict is manifestly against the weight of the evidence, so that plaintiff's right may be protected under the statute in the event that the case is again tried and goes to a verdict in his behalf."

Thus, before the case reached the supreme court, a common pleas judge had found and the court of appeals had twice found that the plaintiff was entitled to determination by a jury of the issues presented, and two juries had returned verdicts in his favor, all of which agrees with the only conclusion which can rationally be drawn from the opinion of the supreme court, namely, that the plaintiff had introduced at least a *scintilla* of evidence.

How, then, could it possibly make any difference, under the scintilla rule, *what* the defendant's evidence was?[3] Yet the supreme court held that, in the absence of the *defendant's* evidence, it could do nothing but reverse the court of appeals and affirm the trial court. The utter antithesis between that and the scintilla rule cannot be escaped. Like crabbed age and youth, they cannot live together.

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[3]In the Kukucz case the bill of exceptions shows only that "numerous witnesses were called in behalf of the defendant". It is therefore possible to argue as follows: So far as appears from the bill of exceptions the defendant may have called the plaintiff as its own witness. If the defendant did call the plaintiff as its own witness, the plaintiff's testimony, given by him as a part of the defendant's case, may have contained admissions requiring a directed verdict for the defendant. Therefore, since every presumption must be indulged in favor of a judgment, the supreme court not only properly sustained the trial court in directing a verdict, but its holding cannot be said to conflict with the scintilla rule for the reason that, a party being bound by his own testimony, a directed verdict against the plaintiff on the basis of his statements as a witness for the defendant, is entirely outside the scope of the scintilla rule.

Abstractly the foregoing argument is sound. It loses all force, however, when subjected to a little scrutiny in the light of experience.

If the defendant in the Kukucz case called the plaintiff to disprove his own (plaintiff's) allegations of negligence on the part of the defendant, or to prove its (defendant's) allegations of contributory negligence on the part of the plaintiff, it was certainly a most extraordinary proceeding. No competent trial lawyer would have thought of doing such a thing. The plaintiff testified in his own behalf and all that the defendant could hope to get from him was available on cross-examination; and the plaintiff was, in fact, cross-examined at length. Therefore, while, in theory, the defendant *may* have called the plaintiff as its witness, nevertheless it is a moral certainty that the defendant actually did no such foolish thing.

If the supreme court, in deciding as it did, had in mind the argument under discussion, it was flying in the face of reality. In the absence of a statement by the court to that effect, we cannot suppose that it took so extravagant a position. If it considered this aspect of the matter at all (and there is nothing to indicate that it did), the court must certainly have taken judicial notice of

As stated in the leading case of *Ellis & Morton* v. *Ohio Life Insurance & Trust Company*,[4] the scintilla rule is as follows:

"Wherever there is any evidence, however slight, tending to prove the facts essential to make out a case for the plaintiff, a non-suit cannot be properly ordered; *it is in no case a question as to the weight, but as to the relevancy of the testimony.*"

If that be the law the directed verdict in the *Kukucz* case is simply unthinkable. Yet the supreme court *reversed* the court of appeals and *affirmed* the trial court. What then *is* the law? In all deference it is submitted that the majority have gotten themselves into a position where they are simultaneously affirming contradictory propositions.

There is another aspect of this matter which leads to the same conclusion. Mr. Metzler[5] says:

"Where an issue has been made by the pleadings which has not been waived, and evidence on the subject, but not conclusive in law, has been submitted, the failure of a party to contradict the evidence produced is not an admission of the facts; for the jury may not believe the evidence. And a charge to the jury that such fact is uncontroverted and has been established is prejudicial error."

Certainly it has been the general understanding of bench and bar in this state that, in sustaining a party's motion for a directed verdict, his own evidence cannot be considered, even though not contradicted by the evidence of his opponent. That proposition

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what every lawyer would say without hesitation, as a matter of everyday common sense, namely, that the plaintiff was *not* called as a witness for the defendant. It is true he *could* have been, but then, as Prof. Eddington points out, if I put a saucepan of water on a fire the water *may freeze*, although we may safely affirm that it will boil "because it is too improbable that it should do anything else". (The Nature of the Physical World, page 76.)

As a matter of fact the plaintiff was *not* called as a witness by the defendant. This clearly appears from the brief in the supreme court on behalf of the defendant, the names of the witnesses called by the defendant being given therein. Can anyone suppose that the court closed its eyes to this admission and decided the case on the hypothesis that the situation may possibly have been other than it was known to have been in fact?

It is therefore submitted that the opinion in the Kukucz case cannot be interpreted otherwise than as being contradictory of the scintilla rule.

[4] 4 Ohio St. 628, 647 (1855).

[5] METZLER, OHIO TRIAL EVIDENCE, p. 119.

is not here defended. On the contrary, it appears to be unsound. Nevertheless it has been adhered to until recently (save in one situation to which reference will shortly be made), and is thoroughly consistent with the scintilla rule.

Under the scintilla rule "wherever there is any evidence, however slight, tending to prove the facts essential to make out a case for the plaintiff, a non-suit cannot be properly ordered; it is in no case a question as to the *weight*, but as to the relevancy of the testimony".[6] Can there be any doubt, then, that there is a wide departure from the outlook and spirit of that rule in holding that a party's *own* evidence may be made the basis of a directed verdict *in his favor?* Yet that is exactly what the supreme court did hold in the *Kukucz* case. "The missing evidence [that is, the *defendant's* evidence] may have fully sustained the trial court's ruling in directing the verdict."[7]

Under the scintilla rule, when considering a motion for a directed verdict, the court can pass *only* upon the *relevancy* of the evidence in the case offered by (or otherwise available to) the party *against* whom the motion is directed. He cannot say that, although relevant, the evidence does not possess sufficient *weight* to justify submission to the jury. Yet, under the decision in the *Kukucz* case, a trial judge may do the converse, that is, may determine that a party's evidence (at least when not contradicted by his opponent's evidence) is not only relevant but *possesses sufficient weight to require a directed verdict in his favor.* Now if the court cannot weigh the evidence of a party *against* whom a directed verdict is asked and assay it to determine whether it has *sufficient probative value to submit to the jury,* how can the court weigh the undisputed evidence of a party *in whose favor* a directed verdict is asked and determine whether it has *sufficient probative value to require the court to grant the motion?* It is submitted that it is a logical impossibility.

In this respect, therefore, as in the other already considered, the scintilla rule and the *Kukucz* case collide head-on. Both cannot survive.

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[6]Ellis & Morton v. Ohio Life Insurance and Trust Co., 4 Ohio St. 628, 647 (1855); Gibbs v. Village of Girard, 88 Ohio St. 34, 41, 43, 102 N. E. 209 (1913).

[7]See *supra* note 3.

The propriety of directing a verdict in favor of a party on the basis of his own undisputed evidence, under certain conditions, would seem to be unquestionable. There is eminent authority for it. Dean Wigmore, in his great work on Evidence,[8] says:

"That a verdict may also be directed *for the proponent* is accepted by the majority of Courts, though it is more plausibly open to dispute. The usual situation is that of a plaintiff who has produced a mass of evidence sufficient to throw upon the defendant the liability of producing some evidence to the contrary, and if this duty is not sustained, it is the judge's function to make the decision. The only objection here can be that the judge must not reach his decision by assuming the plaintiff's testimony to be true (because that is the jury's province); yet where the testimony is *undisputed*, or where in some other way that assumption is unnecessary, *this objection disappears*. A less common situation is that of a defendant having an affirmative plea (for example, payment of a note, or contributory negligence in personal injury): but *here also a verdict may be ordered for the defendant, provided the result can be reached upon undisputed testimony of the defendant*, or upon testimony of the plaintiff, which the latter must concede to be true." (Italics ours.)

Even in this state it has been held proper if the party's evidence, which is not contradicted, is exclusively documentary.[9] But it is clear that there can be no distinction in principle on that basis. Ordinarily, perhaps, documentary evidence is more trustworthy than that of witnesses on the stand. But documents may be forged and altered, while oral testimony in open court is sometimes convincing beyond the possibility of doubt.

The case of *Aetna Life Insurance Company* v. *Lembright*,[10] decided by the court of appeals for Erie County, is directly in point, particularly in view of the fact that the supreme court overruled a motion to certify. That was an action on an employees' group life insurance policy terminable as to each insured upon the cessation of his employment. It was defended on the ground that the particular insured had ceased to be employed prior to his death. To sustain this affirmative defense the insurer introduced evidence, documentary and otherwise, to show the cessation of employment. The evidence to this effect

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[8] 5 WIGMORE, EVIDENCE (2d ed. 1923), p. 461.

[9] Kohl v. Hannaford, 5 Ohio Dec. Rep. 306 (1875).

[10] 32 Ohio App. 10, 166 N. E. 586 (1928).

was not rebutted by the plaintiff and defendant, therefore, moved for a directed verdict. This was overruled and the case sent to the jury, which found for the plaintiff. The court of appeals held that, since the evidence of the defendant as to the termination of the employment was uncontradicted, it was error to overrule the motion for a directed verdict, and itself entered judgment for the insurance company. The plaintiff thereupon filed a motion to certify, which the supreme court overruled on June 19, 1928.

The considerations indicated in the opinion of the supreme court in *French* v. *Millard*[11] effectively dispose of any contention that a trial court *must* direct a verdict in favor of a party whenever his evidence is not contradicted. Trial courts should have *discretion* to do so, however, and unless the *Kukucz* and *Lembright* cases are overruled, they do have it now whatever may have been thought formerly. If they are *not* overruled, the scintilla rule has been destroyed.

The scintilla rule should be abandoned.[12] "To rest upon a formula is a slumber that, prolonged, means death."[13] Nor should the doctrine of *stare decisis* call up misgivings. As Chief Judge Cardozo says, "Hardly a rule of today but may be matched by its opposite of yesterday."[14] Consider the impressive list of overruled decisions in every jurisdiction. Within the last few months the United States Supreme Court, in *Farmers Loan & Trust Co.* v. *Minnesota*,[15] has added further proof that today is not the helpless slave of yesterday. Our own supreme court, when the occasion required, has not hesitated to do likewise.[16] There is here no question of vested rights—the court is free to follow its own judgment. JOSEPH O'MEARA, JR.

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[11]2 Ohio St. 44 (1853).

[12]See the author's note in 2 CIN. L. REV. 450 (1928).

[13]HOLMES, COLLECTED LEGAL PAPERS, 306.

[14]CARDOZO, THE NATURE OF THE JUDICIAL PROCESS, 26.

[15]280 U. S. 204 (1930).

[16]The following are recent instances: Trueson Steel Co. v. Trumbull Cliffs Furnace Co., 120 Ohio St. 394, 166 N. E. 368 (1929); The Commercial Credit Co. v. Schreyer and Anderson v. Smith, 120 Ohio St. 568, 166 N. E. 808 (1929); The State, *ex rel.* Automatic Registering Machine Co. v. Green, 121 Ohio St. 301, 168 N. E. 131 (1929).