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The Scintilla Rule

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The Scintilla Rule

The second paragraph of the syllabus and the opinion in the recent case of *Jacob Laub Baking Company v. Middleton*\(^1\) support the contention advanced by Mr. Walter T. Kinder that the supreme court has abolished the scintilla rule.\(^2\) Syllabus 2 follows:

"When the proof of the essential facts put in issue and the reasonable inferences deducible therefrom are such that the jury, as fair-minded men, should reasonably arrive at but one conclusion, it is the duty of the trial court to direct a verdict in favor of the party which such proof sustains."

The same language appears in the opinion\(^3\) and immediately after it the following:

"If, on the other hand, the proof and inferences are such that fair-minded men could reasonably arrive at different conclusions therefrom, the facts in issue are triable to the jury."

The language quoted is not necessarily inconsistent with the scintilla rule as stated in the leading cases.\(^4\) It can be reconciled therewith on the theory that there is not a scintilla of evidence unless the jury could reasonably find for the plaintiff. Such a reconciliation, however, would involve a stretching of the concept of scintilla.\(^5\) Moreover, practically, the two statements will produce divergent results. The language quoted from *Jacob Laub Baking Company v. Middleton*, in which all concurred, will undoubtedly tend to increase the number of directed verdicts and appears to be, in effect, a repudiation of the scintilla rule.

\(^1\) 118 Ohio St. 106 (1928).

\(^2\) Kinder, *The Scintilla Rule—Should it be Abolished?* 26 Ohio L. BUL. AND REP. 190 (1928).

\(^3\) Supra, n. 1., at p. 115.

"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." Ellis & Morton v. Ohio Life Ins. & Trust Co., 4 Ohio St. 628, 647 (1855); Gibbs v. Village of Girard, 88 Ohio St. 34, 41, 43, 108 N. E. 299 (1913).

"'A 'scintilla' is defined as 'an iota, a tittle, a glimmer, a trace, a minute particle, an atom'."' Kinder, *op. cit.*, supra, note 2, at p. 193.
In view of this most recent expression of the court and of its position as indicated in the opinions in other recent cases, it would seem reasonably clear that the supreme court has turned its back on the scintilla rule were it not for St. Mary's Gas Co. v. Brodbeck, in which Chief Justice Marshall, writing the opinion, in which all concurred, said that "the well-known scintilla rule must be applied and respected by courts, regardless of their belief in the soundness of the rule."

The contrariety thus apparent makes an early and authoritative disposition of the question more than desirable. The scintilla rule is considered out-of-date and unsatisfactory by legal scholars, has been abandoned by most courts, and subjected to attack at intervals even by our own courts.

The mental processes of a court in deciding whether to direct a verdict cannot be articulated, nor can a formula be invented which will provide more than a clue. In any case, the judge must rely almost exclusively upon his "trained intuition" and the result will be the same in most cases regardless of the formula made use of. The vice of the scintilla rule is two-fold: (1) it excites in the scrupulous judge a paralyzing fear of erring on the wrong side; (2) it furnishes an excuse for the weak judge to "pass the buck". In both ways it encourages unmeritorious litigation. It is to be hoped, therefore, that the supreme court will expressly abandon it.

A recognition of the limitations of any test or formula that may be adopted does not mean that no formula is necessary or desirable. Many tests have been proposed. Dean Wigmore considers the following most satisfactory:

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7 114 Ohio St. 423, 429, 151 N. E. 323 (1926).

8 Authorities are collected in the opinion in Cleveland-Akron Bag Co. v. Jaite, supra, note 6, and in Mr. Kinder's paper, supra, note 2.


12 Green, op. cit., supra, note 9, at p. 1031.

13 Wigmore, Evidence (2nd ed. 1923) 458, n. 13.

14 Ibid., note 13, at p. 459.
"(The proposition) cannot merely be, Is there evidence? * * *
The proposition seems to me to be this: Are there facts in evidence
which if unanswered would justify men of ordinary reason and
fairness in affirming the question."

But this rather evades than meets the issue. The standard of
third party judgment ignores the fact that a man has only his
own mental equipment to think with. He cannot call upon the
intelligence of some hypothetical mentality. If he is able to say
that an intelligent man could reasonably think this or that it is
because he himself considers it reasonable. His judgment is his
own.18 The language quoted from Jacob Laub Baking Company v.
Middleton is open to this criticism.

Mr. Kinder takes it for granted that the abandonment of the
scintilla rule means ipso facto the adoption of the federal rule.19
This rule17 has been criticised by Dean Wigmore,18 and it would
seem justly so. Whatever its merits or demerits, its adoption in
this state would amount to a judicial repeal of section 11577 of
the General Code, which provides that a verdict cannot be set
aside more than once on the weight of the evidence.19 If the test
be the same on a motion for a directed verdict as on a motion for
a new trial, then a court, having set aside a verdict, if not bound
to enter judgment for the defendant forthwith, would at least be

18Cf. Green, op. cit., supra, note 9, at pp. 1043, 1044.
19Kinder, op. cit., supra, note 2, at p. 204.
17"* * * many decisions of this court establish that, in every case, it is the
duty of the judge to direct a verdict in favor of one of the parties when the
testimony and all the inferences which the jury could justifiably draw there-
from would be insufficient to support a different finding." Baltimore and Ohio
19"In some courts it is said that the test for the ruling is the same as it would
be on a motion after verdict to set aside the verdict as being against the over-
whelming weight of evidence. Even if this were so, it would not afford any more
concrete and tangible guide. But it seems unsound, on principle, to assert
such an identity, for two reasons—in the first place, because the mass of
evidence in the two situations is very different (for after verdict the defend-
ant's evidence has to be considered with the rest), and in the next place, be-
cause the setting aside of a verdict leads merely to a new trial, while the ruling
of insufficiency leads usually to the direction of a verdict for the opponent,
and therefore a total quantity of the proponents evidence which would justify
the former might be more than would justify the latter." 5 Wigmore, op.
cit., supra, note 13, at pp. 458, 459.
19Cleveland Ry. Co. v. Trendel, 101 Ohio St. 316, 128 N. E. 136 (1920);
compelled, on a retrial, in the absence of additional evidence, to direct a verdict, thus depriving the plaintiff of the benefit of the statute.\(^2\)

Consideration of any question leads the human mind either to certainty or to an opinion, or leaves it in doubt.\(^2\) In the case of the last state of mind the jury will get the case no matter what formula is adopted. If the first prevail there will be an instructed verdict under any test. The cases in which a test or formula will have any potency are those in which the judge's mind has gotten beyond doubt but not reached certainty, which he will seldom, if ever, attain—that is, those cases in which he has formed an opinion. Now an opinion may be strong or it may be weak, and there are unnumbered shades and degrees of both kinds. On one side opinion merges into certainty, on the other side into doubt. The event in any case will, in fact, depend upon the strength of the judge's opinion. But the shades and degrees of opinion have no names; they cannot be articulated. Hence it is manifestly impossible to determine even approximately how strong his opinion must be. Nevertheless, it must be stronger than is required to set aside a verdict; otherwise section 11577 is rendered meaningless.

The problem, therefore, is to devise a formula which, while meeting the objections to the scintilla rule, will put the judge on notice that a greater degree of assurance is required to direct a verdict than to set one aside. More than this we cannot hope to accomplish. No formula can do more than serve as a caution.\(^2\)

The test indicated by the opinions in two other recent cases\(^2\) may be stated as follows: A verdict should be directed if the only reasonable conclusion as to the facts is adverse to the plaintiff on any material issue. This is objectionable on the grounds set out in the preceding paragraph. It does not sufficiently put the judge on notice that a stronger opinion is required to direct a verdict than to set a verdict aside.\(^2\)

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\(^{21}\) COFFEY, EPISTEMOLOGY, 32, 33. Cf. NEWMAN, GRAMMAR OF ASSENT, 5.

\(^{22}\) Cf. Green, op. cit., supra, note 9, at p. 1041.


\(^{24}\) "It is only where a verdict is palpably against the evidence, or the decided weight of it, that courts are warranted in interfering to set it aside, in order to
How then should the test be formulated? The following is proposed: A verdict should be directed whenever, in the opinion of the court, the conclusion as to the facts on any material issue is against the plaintiff beyond a reasonable doubt.

This would indicate, in so far as it seems possible to do so, that a greater degree of assurance is required than is necessary to set aside a verdict. Yet it is not a mere re-statement of the scintilla rule. Holding that the conclusion is against the plaintiff beyond a reasonable doubt is not inconsistent with recognizing that there is "some evidence, however slight". The proposed test is not inconsistent with the most recent expressions of the supreme court and accords with actual judicial practice except in those cases in which the judge is led, either through scrupulosity or a desire to avoid responsibility, to surrender to the jury the judicial function. Finally, it would not lend itself to this abuse, which the scintilla rule invites.

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send the cause to another trial." Webb v. Protection Insurance Co., 6 Ohio 456, 472 (1834). "We cannot disturb a finding of fact made by the jury, unless the verdict is clearly and manifestly not sustained by sufficient evidence." Livingstone & Co. v. Streeter, 114 Ohio St. 144, 147, 150 N. E. 734 (1926).

*It may be objected that "reasonable doubt" should be defined, but attempts at definition tend rather to confuse than to enlighten, for every defining term must itself be defined, so that the matter tends to become one of mere words. Cf. 5 WIGMORE, op. cit., supra, note 13, at pp. 465-469.