CHAPTER 15

EXAMINATION OF WITNESSES, NON-SUIT—DIRECTED VERDICT

What Plaintiff Must Prove

If an action is local, it's necessary that venue be proven in civil actions. If the action is transitory, it may be brought either where the cause of action arose, or where the defendant is, and it isn't necessary to prove venue. All actions involving an injury to land must be brought in the county or district where the land is situated. It's necessary to prove that the land is located in such county or district. But actions for personal injury or for the recovery of money in assumpsit are transitory. They may be brought in any jurisdiction where the plaintiff or defendant may reside or where neither of them may reside, providing only that the defendant is served with process in the county or district in which the action is brought. The plaintiff must also prove every material allegation set forth in the declaration or statement of claim, unless under the statute or rules of court, governing the practice, all allegations of fact made by the plaintiff and not specifically denied by the defendant are admitted of record. In jurisdictions where no pleadings are required, nothing is admitted by the defendant and the burden of proving everything necessary to make out a case rests upon the plaintiff.

Examination of Defendant by Plaintiff

In many jurisdictions, it's clearly provided by statute that either party to an action has the right to call the opposing party to the witness stand and examine her under oath, touching the matters in issue. And it's usually provided in such cases that the parties so examining shall not be bound by the answers of the opposite party. The effect of the latter provision is to permit the party examining, if he desires, to offer other testimony that might impeach, or tend to impeach, the testimony of his adversary. In most cases where this rule has been adopted, it has been held that when one party is called for cross-examination by his opponent, the party thus cross-examined won't be permitted at the close of such cross-examination upon his own motions to go into other matters. Rather, he must reserve whatever testimony he desires to offer until his side of the case is heard. Under this rule, officers of corporations, plaintiff or defendant, may generally be called by the opposing party and cross-examined.

Examination of Witnesses

There is no fixed rule in reference to the order in which witnesses for either party may be called, and the parties are usually permitted to determine for themselves in what order their testimony shall be offered. In some instances, the court in the exercise of a sound discretion may require certain proof to be offered before certain other proof is received. Nor is there a fixed rule as to the number of witnesses each party may call to prove an issue; the parties are permitted generally to offer within reasonable bounds as much cumulative evidence as they desire. It has, however, been frequently held by courts of review that the court may, in its discretion, limit the number of witnesses that may be called to prove a particular issue. Where such discretion is exercised, it must be to place the same restriction upon both parties. The testimony of witnesses who are incompetent under the statute may be received, if no objection is offered.

Cross-Examination

The right of cross-examination of an adversary's witnesses is one that can't be denied and that can only be abridged by the exercise of a sound discretion on the part of the judge. The cross-examination of a witness must be confined to the subjects covered in the direct examination. The court may restrain a cross-examination that unnecessarily prolongs the trial or that travels beyond the direct examination. Neither party is permitted to cross-examine her own witness. But, if the witness is hostile, wider latitude in examination is permitted than would otherwise be allowed.

Voluntary Non-Suit

If the plaintiff, either before he enters upon the trial or at any time during the progress of the trial, concludes that for any reason he desires to proceed no further, he may move for a non-suit. In most jurisdictions, the court has no discretion but to grant the motion unless a set-off has been filed. It frequently arises that, by reason of the absence of witnesses or a failure on the part of the plaintiff to obtain certain proof that he had expected to secure, he finds himself in a position where he's either unable to make out his case or the case made out renders him unwilling to submit it to a jury. Under such circumstances, he has the right to ask for a non-suit. If the case is being tried by the court without a jury, the plaintiff may move for a voluntary non-suit up to the time when the cause is submitted to the court for decision. If the case is tried by a jury, it's generally the law that the plaintiff retains his right to a voluntary non-suit until the jury has left the jury box. If the defendant has filed a suit, however, the plaintiff won't be entitled to a voluntary non-suit. But the court may, in its discretion, grant the non-suit.

Involuntary Non-Suit

An involuntary non-suit usually arises in cases where the plaintiff has failed to take some step in the proceeding within the time required by law, such as the filing of a declaration or other pleading, or where the plaintiff fails to appear upon the case for trial. It often arises because of a misjoinder or non-joinder of parties.

When an involuntary non-suit has occurred, additional time is usually granted to the plaintiff in which to file a new suit, although the statute of limitations may have run out. If the plaintiff finds himself unable to make the necessary proof to sustain his cause of action and the statute of limitations has run out, instead of asking the court for a non-suit, it's important to secure an involuntary non-suit by allowing his cause of action to be dismissed for want of prosecution.

Motion to Direct Verdict

When all of the evidence of the plaintiff has been received, the defendant, if she thinks a case hasn't been made out, may move the court to direct a verdict in her behalf. Such motion operates as a demurrer to the evidence. Upon the hearing of the evidence, the court is required to determine whether, taken altogether, the plaintiff's evidence proves or tends to prove his claim. Upon this motion, the evidence and every reasonable inference that may be drawn from the evidence must be taken as true. Nor can the court consider the credibility of the witnesses. If this motion is granted, it's the usual practice for the court to direct the jury to sign a written verdict for the defendant.

The jury has no discretion in the matter and won't be permitted to retire to the jury room to consider the evidence. The refusal of a juror to sign the verdict may be punished as a contempt of court. The right of the court to direct verdicts in this matter isn't an infringement upon the right of trial by jury. This is true because the only question involved upon such a motion is a question of law and not one of fact, and juries in civil cases are allowed to pass upon questions of fact only.

Also, at the close of all the evidence offered by either side, the plaintiff may make a motion to direct a verdict in his behalf if he thinks the evidence of the defense doesn't sustain his plea. The court is, upon this motion, required to determine whether the evidence offered on behalf of the defense is in law a defense to the plaintiff's case. The same presumptions are indulged on this motion in behalf of the defendant as were allowed on behalf of the plaintiff's evidence. The defendant's evidence and every reasonable inference from it must be taken as true. If this motion is allowed, the court may direct the jury to find a verdict for the plaintiff. It has no discretion in the matter but must obey.

Suppose, at the close of the plaintiff's evidence or at the close of the whole case, the motions to direct verdicts have been overruled and the parties making the same desire to preserve an exception for review in a court of appeal. It's necessary, in most jurisdictions, that written instructions directing such verdict be presented to the judge. And the judge shall mark the same refused. It won't be sufficient to hand such instructions to the judge at the time other proposed instructions are offered.

Objections and Exceptions

If either party desires to preserve the rulings of the court for review upon receiving or rejecting evidence, it's necessary, in all jurisdictions, that objections be made at the time such evidence is offered and the judge be called upon at the time to rule upon such objections. An exception to the rulings of the court should be taken immediately after the court has made an adverse decision. It's now the rule in many courts that no exceptions are required to be taken after the court has ruled, but that exceptions will be allowed upon the record. An objection that isn't followed up by a ruling of the court won't avail the objector, but on review, will be considered as having been waived. If either party objects to the argument of opposing counsel, it's necessary, to preserve an exception, that the court rule upon such objection. A mere objection without such ruling will be of no avail.

The purpose of preserving exceptions is to make it manifest to the reviewing court that the trial court had ample opportunity to correct the alleged error. Exceptions ought to be taken, not only to the evidence admitted, but also to the adverse decisions as to all motions and other rulings by the court.