Practice—Appeal by Defendant to Whom New Trial Has Been Granted—[Ohio].—The defendant moved for a directed verdict at the close of the plaintiff's testimony and at the close of the entire evidence. Both motions were overruled and a verdict returned for plaintiff by the jury. The defendant then moved for judgment and for a new trial. The defendant's motion for judgment was overruled but his motion for a new trial was granted, on the grounds that the verdict was against the weight of the evidence. No judgment was at any time rendered for either party in the trial court. The defendant appealed, citing as error the overruling of his motions for a directed verdict and for judgment after verdict. *Held* (one judge dissenting), the order granting a new trial was a final order which would support an appeal from errors in the trial by the defendant to whom it was granted. *Michigan-Ohio-Indiana Coal Ass'n v. Nigh*, 131 Ohio St. 405, 3 N.E. (2d) 355 (1936).

The statement of the dissenting judge that an order granting a new trial was not a final order sufficient to support an appeal was in accord with earlier Ohio decisions and with decisions of other jurisdictions. *Continental Trust Co. v. Home Fuel & Supply Co.*, 99 Ohio St. 453, 126 N.E. 508 (1919); *Huff v. Pennsylvania R.R. Co.*, 127 Ohio St. 94, 187 N.E. 1 (1933); *Hunt v. United States*, 53 F. (2d) 333 (C.C.A. 10th 1931). But two recent Ohio *per curiam* decisions held an order granting a new trial a final order. *Hocking Valley Mining Co. v. Hunter*, 130 Ohio St. 333, 199 N.E. 184 (1935); *Cincinnati Goodwill Industries v. Neuerman*, 130 Ohio St. 334, 199 N.E. 178 (1935). See also Smith-Hurd's Ill. Rev. Stat. 1935, c. 110, § 201, Ill. C. P. A. 1933, § 77.

The court in the principal case insisted that granting a new trial to the defendant should not preclude him from appealing from the overruling of his motion for a directed verdict. The objection to allowing such appeal by the defendant after he has moved for and obtained a new trial is that he is thereby afforded too great an opportunity to delay action in the case without any detriment other than the costs of appeal. And by so delaying he may force the plaintiff to accept a relatively unfavorable settlement.

Where an order granting a new trial is not a final order, it is clear that no appeal can be taken from error in the trial by the party to whom a new trial is granted. *Bloomberg v. Bloomberg*, 148 Wash. 638, 269 Pac. 852 (1928); *Wolfe v. City of Miami*, 114 Fla. 238, 154 So. 196 (1934). In Iowa the appellate court (on an appeal raising the sufficiency of the evidence) usually remands for a new trial only, even though it feels that the trial court should have directed a verdict or given final judgment. 1 Iowa Bar Rev. 57 (1935). And in the federal courts, the jury's return of a verdict for one party precludes the entry of a final judgment for the other party even though the court admits that the evidence was insufficient to support the verdict. *Slocum v. New York L. Ins. Co.*, 228 U.S. 364 (1913); *cf. Baltimore v. Redman*, 295 U.S. 654 (1935); see also Rules of Civil Procedure for the Federal Courts, rule 56 (prelim. draft 1936). Again while a statute seems to provide for final judgment on appeal from the granting of a new trial, Pennsylvania courts have been very reluctant to upset the ruling granting a new trial. See Purdon's Penn. Stats. 1931, tit. 12, § 682; *March v. Philadelphia Co.*, 285 Pa. 413, 132 Atl. 355 (1926).

The Indiana courts have suggested that the defendant in moving for a new trial has elected not to pursue his remedy for the overruling of his motion for judgment *non obstante veredicto*. See *Lousiville Ry. Co. v. Miller*, 141 Ind. 533, 37 N.E. 343 (1894); *King v. Inland Steel Co.*, 177 Ind. 201, 96 N.E. 337 (1911); *Evansville Ry. Co. v. Cook-*

sey, 63 Ind. App. 482, 112 N.E. 541 (1916). Manifestly, however, there can be no election when a motion for a new trial is a prerequisite to appeal from the errors complained of. The "election" theory would therefore be inapplicable in many jurisdictions. See, *e.g.*, *Lavene v. Friedrich's Adm'r*, 186 Ind. 333, 115 N.E. 324 (1917); *Gorrell v. South's Adm'r*, 260 Ky. 28, 83 S.W. (2d) 518 (1925); *Elfers v. Schuff*, 127 Neb. 236, 254 N.W. 885 (1934); *Dawson v. Cohn*, 172 Okla. 28, 43 P. (2d) 1034 (1935). In Ohio, however, a motion for a new trial is not a prerequisite to an appeal from the overruling of a motion for a directed verdict. *Jacob Laub Baking Co. v. Middleton*, 118 Ohio St. 106, 160 N.E. 629 (1928); *Inglish v. Industrial Commission of Ohio*, 125 Ohio St. 494, 182 N.E. 31 (1932). Thus in the principal case, at first sight it might be urged that the defendant by seeking a new trial elected to waive the error in overruling his motion for a directed verdict. But in Ohio at the time of this case a motion for judgment *non obstante veredicto* raised only the sufficiency of the pleadings, not the sufficiency of the evidence. Throckmorton's Ohio Ann. Code 1934, § 11601; changed by Ohio L. 1935, p. 413. And in *Lehman v. Harvey* (45 Ohio App. 215, 187 N.E. 28 (1933)) the court held (possibly by way of *dictum*) that if a motion for a new trial is made in conjunction with a motion for judgment, the sufficiency of the evidence to support the verdict is thereby raised and the trial court may grant final judgment. See 9 U. of Cin. L. Rev. 67 (1935). Thus the defendant's motion for a new trial is more properly interpreted as an attempt to obtain final judgment in the trial court in the present proceeding rather than an election to rely on his new trial and waive appeal. *Cf. Barker v. Barker Artesian Well*, 45 R.I. 297, 121 Atl. 117 (1923) (defendant having been granted a conditional new trial appealed before plaintiff failed to make *remittitur* within a specified time; court did not rely on conditional nature of new trial, however).

Should the problem in the principal case arise again in Ohio, the passage of a recent statute (Ohio L. 1935, p. 413) may well lead the court to the opposite conclusion. This statute allows the trial court to grant final judgment on a motion for judgment *non obstante veredicto* if the evidence was insufficient to support the verdict returned by the jury. Thus a motion for a new trial could not be interpreted as a necessary attempt to obtain final judgment and, by the "election" theory, if the defendant's motion for a new trial is granted, he should be confined to this remedy.