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Judicial Control over the Sufficiency of the Evidence in Jury Trials

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JUDICIAL CONTROL OVER THE SUFFICIENCY OF THE EVIDENCE IN JURY TRIALS

I. Early Methods of Controlling Verdicts of Juries.

One has only to read the first few chapters of Thayer's Preliminary Treatise on Evidence to realize that the history of trial by jury, from its beginning until the present day, records a continuous struggle to prevent the rendition of unreasonable verdicts.

When the jury was really a body of witnesses summoned to try the case on their own knowledge, rather than upon evidence produced in court, it was sought to control their verdict by attaint. By this proceeding a new jury would be summoned to re-examine the issue tried by the first jury, and if the second found that the verdict of the first jury was false, the verdict would be reversed and the first jury severely punished by infamy, forfeiture of their property, and imprisonment.[1] This crude method of controlling the jury was employed in this country in colonial times until it became obsolete because of the development of more effective devices.[2]

But the severity of the punishment of common-law attaint rendered the remedy unenforceable, and for a time the English judges resorted to the practice of fining the jury as for misbehavior. But this procedure, hardly more satisfactory than ordinary attaint, was abandoned after *Bushel's Case*,[3] decided in 1670. There, according to Thayer,

> "The jurors who acquitted William Penn and William Meade on a charge of taking part in an unlawful assembly, etc., were fined and imprisoned. But on 'habeas corpus' in the Common Pleas, they were discharged, and Vaughan, C. J., pronounced the memorable opinion which ended the fining of jurors for their verdicts, and vindicated their character as judges of fact."[4]

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[1] Thayer, Evidence, 137-140; 1 Holdsworth, Hist. of Eng. Law, 161, Scott, "Fundamentals of Procedure in Actions at Law", 90; 3 Blackstone Comm. 402.

[2] Thayer, op. cit. 173; Scott, op. cit. 90. Attaint, although long obsolete, was not actually abolished in England until 1825. 1 Holdsworth, Hist. of Eng. Law., 161.

[3] Vaughan 135, 124 Eng. Reprints, 1006 (1670).

[4] Thayer, op. cit. 166.

With "attaint" obsolete and the fines not feasible, the judges after some hesitancy worked out a new method of control by granting new trials.[5] Beginning with *Wood v. Gunston*,[6] decided in 1655, the courts began the practice of granting new trials where the jury had rendered a verdict in disregard of instructions, such action being regarded as misconduct, or where the verdict was contrary to the evidence.

Also the practice of demurring to the evidence was gaining favor with litigants who desired to avoid the jury So long as the jury could decide cases on their own knowledge and evidence produced in court was merely to aid the jury in reaching a verdict this system was of little or no value except in actions founded on written documents of which "profert" could be demanded.[7] But the notion was becoming recognized that juries should decide cases solely on the basis of evidence produced in court, and the demurrer to the evidence came to be an effective method of withdrawing the case from the jury on the theory that by admitting the facts there remained only a question of law to be decided.[8]

The demurrer to the evidence, as an effective device, received its mortal blow in 1794 in the case of *Gibson v. Hunter*,[9] which held

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[5] THAYER, op. cit. 166. And see next footnote. As late as 1648, in *Slade's* Case, Style 138, on motion that judgment might be arrested and a new trial granted because the verdict passed against the opinion of the trial judge, the court held that the judgment ought not to be stayed "for it was too arbitrary for them (the judges) to do it, and you may have your attaint against the jury and there is no other remedy in law for you; but it were good to advise the party to suffer a new trial for better satisfaction."

[6] Style 466. 82 Eng. Reprints, 867. In an anonymous case, 1 Keb. 864 (1665) "the court of King's Bench, on certificate of a judge that the verdict was given contrary to the evidence, but ordered the sheriff should return a good jury in the new trial. Hyde, Chief Justice, conceived jurors ought to be fined if they would go against hare and direction, take bit in mouth and go headstrong against the court; and said that by the grace of God he would have it tried, seeing the attaint is now fruitless." The remedy of granting a new trial did not become well established until somewhat later. See *Martyn v. Jackson*, 3 Keb. 398 (1675) where it is said that "juries are wilful enough, and denying new trial here will but send parties into the chancery yet new trial was denied." In *Ash v. Ash*, Comb. 357 (1697) Holt, C. J., denied the "despotic power" of the jury and granted a new trial because of excessive damages. For an application to chancery see *Mill v. Wharton*, 2 Vern. 378 (1700)

[7] *Middelton v. Baker* Cro. Eliz. 752; 78 Eng. Rep. 983 (1600).

[8] See Smith dem. *Dormer v. Packhurst*, Andrews 315 (1738) *Stephens v. White*, (Va. 1796) 2 Wash. 203.

[9] 211 BLACKSTONE, 187 126 Eng. Rep. 499. See discussion by THAYER, op. cit. 235.

that where the evidence was circumstantial, the demurrant must expressly admit every fact which the evidence tended to prove; in other words, the worst possible finding which the jury could return against the demurrant. After *Gibson v. Hunter,* it was safer for a litigant to take his chances with the jury where the evidence was circumstantial. Furthermore, one could only demur to his opponent's evidence,[10] and by so doing the demurrant forfeited the opportunity of putting in his own evidence and having the jury decide the issue. Moreover, if the demurrer was not well founded, judgment was rendered against the demurrant. Hence, after *Gibson v. Hunter* demurrers to the evidence fell largely into disuse, and motions to direct a verdict or to enter a nonsuit took their place, upon the denial of which the moving party was still entitled to have the case submitted to the jury.[11] The courts were inclined to favor the nonsuit over the directed verdict, because a nonsuit did not prevent the bringing of another action, whereas a directed verdict did.

Once the idea was accepted that juries must decide issues of fact upon the basis of evidence produced in open court, it followed that where the party bearing the burden of proof had produced no evidence, the jury could not decide in his favor. So the practice of directing a verdict began with cases where the proponent[12] had offered no proof. Probably the first case of note, where the verdict was directed on this ground was *Syderbottom v. Smith,*[13] decided in 1725. And the process was completed in 1824 when it was finally ruled in *Bulkeley v. Butler,*[14] that the refusal to direct a verdict might be reviewed on bill of exceptions.

The two weapons that have thus come down to us for controlling the verdicts of juries with respect to the sufficiency of the evidence are (a) granting of a new trial, and (b) taking the case from the jury entirely, either before verdict, on motion for nonsuit, directed verdict, or its statutory companion, challenge

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[10] *Woodgates Admin. v. Threlkeld,* (Ky. 1814) 3 Bibb. 527.

[11] *G. H. & S. A. Ry v. Templeton,* 87 Tex. 42, 26 S. W 1066 (1894) see also, *Slocum v. N. Y. Life Ins. Co.,* 228 U. S. 364, 33 Sup .Ct. 523 (1913). "The advantages over the demurrer to the evidence of the modern practice of moving for a nonsuit, a dismissal or a directed verdict, is that if the motion is denied, the moving party may still be entitled to have the issues submitted to the jury." *Eberstadt v. State,* 92 Tex. 94, 45 S. W 1007 (1898). See also, *Browder v. Phinney,* 30 Wash. 74 (1902).

[12] Used to designate the party bearing the burden of going forward with the evidence.

[13] 1 STRANGE 649, 93 Eng. Rep. 759.

[14] 2 B. & C. 434 (1824).

to the legal sufficiency of the evidence,[15] or, after verdict, on motion for judgment notwithstanding the verdict.

II. New Trials.

In an early English case[16] decided in 1757, Lord Mansfield, in commenting upon the power of the courts to grant new trials, remarked (p. 393)

> "Trials by jury, in civil cases, could not subsist now without a power somewhere to grant new trials. But a general verdict can only be set aside by a new trial, which is no more than having the cause more deliberately considered by another jury, when there is a reasonable doubt, or perhaps a certainty, that justice has not been done. "

Ever since the power to grant new trials became recognized, it has been more generously exercised than the power to take the case from the jury entirely, for the reason that the consequences are not so severe. A directed verdict, or a ruling sustaining a challenge to the sufficiency of the evidence, constitutes a decision on the merits,[17] and, unless reversed on appeal, ends the litigation. Even a nonsuit, though not a bar to another action, ends the particular action and requires the bringing of a new one. On the other hand, setting aside the verdict and granting a new trial, continues the litigation and submits the cause to another jury Furthermore, a verdict may be set aside on grounds other than that it is against the weight of the evidence. Misconduct of the prevailing party or jury, excessive or inadequate damages given under the influence of passion or prejudice, and newly discovered evidence, or accident or surprise are familiar examples of grounds warranting a new trial.[18]

III. Taking the Case From the Jury.

a. The Scintilla Rule.

It is now well established that when the evidence is insufficient

[15] Rem. Comp. Stat. sec. 340, amended Laws of Wash. 1929, Chap. 89, sec. 2. See notes of Revision Committee printed on House Bill No. 26 as to the purposes of the amendment.

[16] *Bright v. Eynon*, 1 Burr. 390, 97 Rep. 365.

[17] *McKim v. Porter* 60 Wash. 270, 110 Pac. 1073 (1910).

[18] Rem. Comp. Stat., sec. 399.

to warrant any verdict, the case may be taken from the jury entirely, either before verdict, on motion for a nonsuit, or a directed verdict, or a challenge to the sufficiency of the evidence, or, after verdict, on motion for judgment notwithstanding the verdict, or, even after disagreement of the jury, on motion for judgment notwithstanding the failure of the jury to agree upon a verdict.[19]

The question then arises. When is the evidence insufficient, so as to permit the case to be taken from the jury?

At first the rule was that if the proponent had offered *any* evidence, the court could not direct a verdict. In the case of *Company of Carpenters v. Hayward,*[20] decided in 1780, we find the following statement by Buller, J. (p. 375)

> "Whether there be any evidence, is a question for the judge, whether sufficient evidence, is for the jury"

Even in 1856, the Supreme Court of the United States in *Richardson v. City of Boston*[21] reversed a judgment based on a directed verdict where there was some evidence. Grier, J., said (p. 268)

> "As it is the duty of the jury to decide the facts, sufficiency of evidence to prove those facts must necessarily be within their province."

Speaking of a directed verdict, the Justice continued.

> "An instruction like this is imperative on a jury, it has taken the place in practice, of a demurrer to the evidence, and must be governed by the same rules. If there be no evidence whatever to prove the averments in the declaration, it is the duty of the court to give such peremptory instruction. But if there be some evidence, tending to support the averment, its value must be submitted to the jury with proper instruction from the court."

However, it is evident that the rule that a "scintilla" of evidence made a case for the jury was soon abandoned. In *Toomey v. London Ry. Co.,*[22] decided in 1857, Williams, J., said

> "It is not enough that there was some evidence, for

[19] *Fobes Supply Co. v. Kendrick,* 88 Wash. 284, 152 Pac. 1028 (1915).
[20] 1 Doug. 374, 93 Rep. 759.
[21] 19 How. 263.
[22] 3 C. B. (ns.) 146, 140 Rep. 694.

> every person who has had any experience in courts of justice knows well that a case of this sort against a railway company could only be submitted to a jury with one result. A scintilla of evidence or a mere surmise that there might have been negligence on the part of the defendants, clearly would not justify the judge in leaving the case to the jury, there must be evidence upon which they might reasonably and properly conclude that there was negligence."

In the same case, Willes, J., remarked that in order to make a case for the jury (p. 150),

> "It was incumbent on the plaintiff to prove some fact which was more consistent with negligence than with the absence of it."

The Supreme Court of the United States, it appears, soon followed the lead of the English court. For in the case of *Improvement Co. v. Munson*,[23] decided in 1872, we find Mr. Justice Clifford declaring (p. 448)

> "Nor are judges any longer required to submit a question to the jury merely because some evidence has been introduced by the party bearing the burden of proof, unless the evidence be of such a character that it would war rant the jury in finding a verdict in favor of that party "
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> Formerly, it was held that if there was what was called a scintilla of evidence in support of a case, the judge was bound to leave it to the jury, but more recent decisions of high authority have established a more reasonable rule that in every case, before the evidence is left to the jury, there is a preliminary question for the judge, not whether there is literally no evidence, but whether there is any evidence upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the burden of proof is imposed."[24]

The same advance was made in the state courts. In 1874, in the case of *Baulic v. R. R. Co.*,[25] the New York Court of Appeals, speaking through Allen, J., said (p. 366)

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[23] 14 Wall. 442. In *Small Co. v. Lamborn Co.*, 267 U. S. 248, (1925) the rule was recently reiterated.

[24] Citing among others the English case of *Toomey v. R. R.*, *supra*, note 22.

[25] 59 N. Y. 356 (1874).

> "It is not enough to authorize the submission of a question, as one of fact to a jury, that there is some evidence, a scintilla of evidence, or a mere surmise that there may have been negligence on the part of the defendants would not justify the judge in leaving the case to the jury (per *Toomey v. R. R. Co., supra*) In another case it was held that a judge will not be justified in leaving the case to the jury when the plaintiff's evidence is equally consistent with the absence as with the existence of negligence in the defendant. In such a case the party affirming negligence has altogether failed to establish it, and Earle, C. J., says, 'that is a rule which ought never be lost sight of.' (*Cotton v. Wood,* 8 C. B. (N.S.) 528.)"

In *Hyatt v. Johnson,*[26] decided in 1879, Justice Sharret of the Supreme Court of Pennsylvania, said (p. 200)

> "Since the 'scintilla' doctrine has been exploded, both in England and in this country, the preliminary question of law for the court is not whether there is literally no evidence or a mere scintilla, but whether there is any that ought reasonably to satisfy the jury that the fact sought to be proved is established."

In adhering to the same rule, the Supreme Court of the state of Washington, in the case of *McCowan v. Northwestern Siberian Co.,*[27] decided in 1906, speaking through Judge Fullerton said.

> "Appellant's counsel quotes from the decisions of the Supreme Court of the United States, and from others of this state following that court, the rule that the question before the court is not whether there is literally no evidence on the question at issue, but whether there is any upon which the jury can properly proceed to find a verdict for the party producing it the party on whom the burden of proof is imposed, and he argues further that while in this case there may be a scintilla of evidence in favor of the respondent, there is no substantial evidence sustaining his side of the controversy, and hence no sufficient evidence to sustain a verdict. The rule of law here announced by the appellant must be conceded. Unquestionably, if it be true that there was no more than a scintilla of evidence in favor of the respondent or,—

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[26] 91 Pa. St. 196 (1879).

[27] 41 Wash. 675, 84 Pac. 614. See also to the same effect, *Jones v. Harris,* 122 Wash. 69, 210 Pac. 22 (1922) *Adams v. Anderson Lumber Co.,* 124 Wash. 356, 214 Pac. 835 (1923) *Kelly v. Drumheller* 50 Wash. Dec. 104, 272 Pac. 731.

> to state the rule in another form—no substantial evidence in his favor, the judgment must be set aside."

And further

> "The question, therefore, is, was there any substantial evidence upon which the judgment can be sustained."

Thus evolved the modern rule that a case cannot be taken from the jury, if on the evidence adduced, the jury could reasonably declare the facts to be proved, necessary to establish his case.

b. Power of the Trial Court With Respect to the Sufficiency of the Evidence.

In passing on an appropriate motion to take the case from the jury, the court considers whether there is any evidence from which the jury may reasonably infer the ultimate or operative facts necessary to establish the proponent's case. If there is such evidence, it is reversible error to take the case from the jury, and it makes no difference that there is other evidence in sharp conflict with that which tends to establish the proponent's case. Once the proponent has established a prima facie case, his right to have the jury pass upon the question cannot be destroyed by conflicting or rebutting evidence, no matter how preponderating.[28]

On the other hand, a judge, in passing upon a motion to set aside a verdict as against the weight of the evidence and to grant a new trial, can not only consider whether there was any evidence which, if believed by the jury would sustain the verdict, but he can take into consideration the opposing evidence. In other words, he can weigh the evidence and if he feels that the jury had acted unreasonably in believing proponent's evidence, in view of the more preponderating evidence on the other side, he can set aside the verdict and grant a new trial.[29]

That this distinction has been recognized by the Supreme Court of this state is no longer a matter of doubt, for in the case of *Clark v. Great Northern R. R. Co.*[30] it was said *per curiam,* on page 540

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[28] *Dublin, Wicklow & Wexford Ry. Co. v. Slattery,* 3 A. C. 1155 (1878) Accord: *O'Conner v. Force,* 58 Wash. 217, 109 Pac. 1014 (1910) and see note 44.

[29] *Jones v. Spencer* 77 L. T. R. 536 (1898).

[30] 37 Wash. 537, 79 Pac. 1108, 2 Ann. Cas. 760 (1905)—*see also Tacoma v.*

> "Our statute provides (Rem. Comp. Stat., sec. 399) that a new trial may be granted, among other grounds, for insufficiency of the evidence to justify the verdict, and this power must be exercised by the trial court if at all. These courts should take due care not to invade the legitimate province of the jury, but if after giving full consideration to the testimony in light of the verdict, the trial judge is still satisfied that the verdict is against the weight of the evidence, and that substantial justice has not been done between the parties, it is his duty to set the verdict aside."

It has been stated that the failure to recognize the distinction has often resulted in a misinterpretation of the statement commonly found in opinions dealing with directed verdicts, that a court "may direct where the evidence is of such a conclusive character that the court in the exercise of its sound discretion would be compelled to set aside a verdict rendered in opposition to it."[31] Undoubtedly, these statements (though the contention is made that they are based on no more than a scintilla of evidence), have been interpreted, and reasonably so, to mean that if the court could set a verdict aside, then it could direct a contrary verdict in the first instance. Or since the court could weigh the evidence[32] for the purpose of setting it aside, then under like conditions it could direct a verdict on the weight of the evidence.

In *McPeck v. Central Vt. R. R. Co.*[33] the court said (p. 591)

> "As was said by us in *DeLoria v. Whitney,* 11 C. C. A. 355, 361, 63 Fed. 611, 'When a verdict in one direction ought to be set aside as against the weight of the evidence, then, under the rule as it is now understood, the court ought to direct a verdict in the other direction.' The time has gone by when the federal courts sit at their own loss of time, and at the expense of the parties to take verdicts which they can foresee ought to not be taken."

On the other hand, the Circuit Court of Appeals, Sixth Circuit, in *Mount Adams R. R. Co. v. Lowery*[34] clearly pointed out, in sup-

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Tacoma Light and W Co., 16 Wash. 288, 47 Pac. 738 (1897), *Kincaid v. Walla Walla Valley Tract Co.*, 57 Wash. 334, 106 Pac. 918 (1910), *In Re Renton*, 61 Wash. 330, 112 P. 348 (1910)

[31] For such statements see—*Delaware L. & W R. Co. v. Converse*, 139 U. S. 469, 11 Sup. Ct. 569 (1890), *Pleasants v. Flant*, 89 U. S. 116 (1875).

[32] Note 30, *supra.*

[33] C. C. A. 79 Fed. 590 (1897).

[34] 74 Fed. 463 (1896).

port of the view taken by the Supreme Court of Washington (later to be more fully examined) a distinction between the power to direct a verdict and the power to set aside a verdict. The question before the court was whether a verdict should have been directed, Justice Lurton said (p. 470)

> "Neither is it the proper standard to settle for a peremptory instruction that the court, after weighing the evidence in the case, would, upon a motion for a new trial, set aside the verdict. The court may and often should set aside a verdict when clearly against the weight of the evidence, when it would not be justified in directing a verdict."

There is some doubt as to which of the two theories above set forth the weight of authority can be said to support, although the former is usually said to be the federal rule.[35] A leading case, and one most vigorously urged in support of the distinction as above pointed out, is the well-known case of *McDonald v. Metropolitan Street Ry. Co.*,[36] which was decided in 1901. In that case the plaintiff's evidence established a case which, undisputed, was sufficient to warrant a verdict in her favor. But the Appellate Division said that at the close of the defendant's evidence the plaintiff's case had been so far overcome that a verdict in her favor would have been set aside as against the weight of the evidence. Under these conditions of proof, that court then held that the trial court might have properly submitted the case to the jury if it had seen fit, but that it was not required to do so as the verdict might have been set aside. Consequently a judgment for defendant based upon a directed verdict was affirmed.[37] The Court of Appeals reversed the judgment, however, and ordered a new trial. Judge Martin, speaking for the court, said (p. 69)

> "While in many cases, even when the evidence is sufficient to sustain it, a verdict may be properly set aside and a new trial ordered, yet, that in every such case the trial

[35] 26 R. C. L. p. 1068, where many authorities are collected, 38 Cyc. 1571. For an excellent review of the early cases on this phase, see: 22 COLUMBIA LAW REV. 256. The Supreme Court of the United States appears to support the first view: *Pleasants v. Flant*, 22 Wall. 116-120 (1875) see also note 23, *supra*. But, as appears from the quotations above from the circuit courts of appeals of two different circuits, the federal courts are not in harmony as to the scope of the rule laid down by the Supreme Court. In the latest case, *Small Co. v. Lamborn Co.*, 267 U. S. 248 (1925) the Supreme Court, while reiterating the so-called fderal rule on directing verdicts where a verdict would be set aside, links it with the "scintilla" rule.

[36] 167 N. Y. 66, 60 N. E. 282.

[37] 46 App. Div 143, 61 N. Y. Supp. 817 (1899)

court may wherever it sees fit, direct a verdict and thus forever conclude the parties, has no basis in the law, which confides to juries, and not to courts the determination of facts in this class of cases.

"We think that it cannot be correctly said in any case where the right of trial by jury exists, and the evidence presents an actual issue of fact, that a court may properly direct a verdict.

"The credibility of witnesses, the effect and weight of conflicting and contradictory testimony, are all questions of fact and not questions of law. If there is no evidence to sustain an opposite verdict, a trial court is justified in directing one, not because it would have authority to set aside an opposite one, but because there was an actual defect in the proof, and hence as a matter of law the party was not entitled to recover."

In *Weir v. Seattle Electric Co.*,[38] a case decided by the Supreme Court of this state in 1906, the court therein justified the distinction between the limited power to direct a verdict and the broader power of setting a verdict aside on the basis of their respective consequences. In the latter instance there is a retrial, while in the former the judgment is final.

Following the case of *McDonald v. Metropolitan St. R. R. Co.*,[39] Judge Rudkin in the aforesaid case of *Weir v. Seattle Electric Co.*[40] said (p. 661)

"The respondent further contends that the preponderance of the testimony was so strongly in its favor that it would have been the duty of the court to set aside a verdict in favor of appellant, had one been found, or returned, and that the court was therefore justified in directing a verdict in the first instance. Judging from the number of witnesses alone, and that is practically the only guide we have, it will readily be conceded that a preponderance of the testimony was with the respondent, but that alone will not justify the action of the trial court [in directing a verdict in their favor]. Doubtless in some jurisdictions the rule prevails that, if the court would set aside a verdict in favor of one of the parties, as against the evidence, it may direct a judgment in favor of the adverse party, but that rule does not obtain in this state. We have uniformly held that the granting of a new trial rests in the discretion of the trial court, and if

[38] 41 Wash. 657, 84 Pac. 597.
[39] Note 36, *supra*.
[40] Note 38, *supra*. Accord: *Davies v. Rose-Marshall Coal Co.*, 74 Wash. 565, 134 Pac. 180 (1913).

> we concede to the trial courts the same power or discretion in directing judgments, the right of trial by jury will be practically abrogated."

The court in the same case further remarked on page 662

> "The power of the Superior Court to direct a judgment is practically commensurate with its power to direct a nonsuit. The only substantial difference between the two judgments is that the former is 'res adjudicata,' while the latter is not unless based on some affirmative finding. Cases may arise in which a plaintiff's prima facie case is so fully explained and controverted as to have no substantial conflict in the testimony, but ordinarily testimony which is sufficient to carry it to the jury at the close of the testimony [41]

In the case of *Messir v. McLean*,[42] decided in 1908, which was an action to recover for personal injuries received by plaintiff while in defendant's employ, alleged to have been caused by the defendant's negligence, issue was taken on the allegations of negligence and the defense of contributory negligence. Trial was entered upon before the court and jury At the close of the plaintiff's case a challenge was interposed to the sufficiency of the evidence, which was overruled. The jury returned a verdict in favor of the plaintiff, and the court after overruling a motion for a new trial, granted a motion for a directed judgment notwithstanding the verdict. On appeal taken from the judgment so entered, Judge Fullerton, speaking for the court, said (p. 142)

> "In this case the evidence on the part of the appellant (plaintiff) tended to show that this duty (providing a safe place in which to work) had not been performed, and that the appellant had received an injury as the result of negligence on the part of the respondent, tended to show that the place complained of as unsafe was reasonably safe, and that the injury was the result of the appellant's own negligence. But this left a question for the jury, not the judge, to determine, and it was therefore error on the part of the court to direct the verdict (complained of) Of course, if the judge was of the opinion that the evidence preponderated in favor of the respondent, it was his province to grant a new trial so that

[41] See; *Morris v. Warwick*, 42 Wash. 480, 85 Pac. 42, 7 Ann. Cas. 687 (1906) to the effect that the trial judge has no power to discharge the jury and render judgment for the defendant because he thought a new trial would be necessary if any other verdict was returned, *unless* there is no legal testimony to sustain a verdict for the plaintiff.

[42] 51 Wash. 140, 98 Pac. 106.

> the question of fact might be submitted to another jury, but it was not his province for any such reason to take the question from the jury and determine it as a finality himself."

The rule forbidding the court to direct a verdict on the weight of the evidence, was well stated in *O'Connor v. Force.*[43] Judge Fullerton, again speaking for the court, said.

> "We are still satisfied that the appellants (plaintiffs) by their evidence made a 'prima facie' case. This being so, the trial judge should not have denied them the right of trial by jury on mere contradictory evidence, no matter what his own conclusions may have been as to the weight of the evidence. If in his belief the evidence against the plaintiff was so far overwhelming as to cause him to feel that the verdict of the jury amounted to a miscarriage of justice, it was his province to set the verdict aside and submit the question to a second jury, but he had no right to take the burden of deciding the facts upon himself. The right of trial by jury is a constitutional right, and is not to be denied a litigant who insists upon it and complies with the statutes relating thereto."

Again Judge Fullerton, in the later case of *Hendrickson v. Smith,*[44] decided in 1920, declared (p. 88)

> "Appellants argue that the evidence is so overwhelming on their side as to require the court either to direct a verdict in their favor or to enter a judgment for them against the adverse verdict of the jury By an express provision of the constitution of the state, and by the general laws, a litigant has the absolute right to have disputed questions of fact submitted to the determination of a jury " " and it is within the power of the trial court to set aside a verdict which he is convinced is contrary to the evidence and submit the disputed question to another jury But this is the limit of the power. Judges cannot, without violating the fundamental law, substitute their opinions on a disputed question of fact, for the opinions of juries, and enter judgment contrary to the verdict of such juries. So here, since there was a substantial conflict in the evidence on a matter material to the inquiry, the court did not err in refusing to direct for the defendants."

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[43] 58 Wash. 217, 109 Pac. 1014 (1910).

[44] 111 Wash. 82, 189 Pac. 550.

This distinction would seem to be further justified by examining and contrasting the statutes of this state, relating to the granting of new trials,[45] and the withdrawing of cases from the jury following a challenge to the sufficiency of the evidence,[46] and the resulting direction of the verdict by the court. And the 1929 amendment[47] expressly provides that in passing on challenges to the sufficiency of the evidence the court shall not pass on disputed questions of fact.

The case of *Morris v. Warwick*[48] was an action for the alienation of the affections of the plaintiff's wife. At the close of the plaintiff's testimony defendant's motion for a nonsuit was denied, and at the close of the case the defendant challenged the legal sufficiency of the testimony and also moved the court for an instructed verdict. The court thereupon discharged the jury and entered judgment, saying to the jury, in effect, that "it was the court's duty to discharge them and render a verdict in accordance with the court's opinion, inasmuch as the court in view of the testimony would be compelled to set aside a verdict for the plaintiff should the jury return one." The Supreme Court upon appeal, reversing the judgment entered below in favor of the defendant, said

> " Bal. Code, sec. 5071, sub. div 7 (Rem. Comp. Stat., sec. 399, sub. div 7) especially makes insufficiency of the evidence to justify a verdict a ground for granting a new trial. But it will be observed that it does not authorize the court to take the case from the jury and make a final determination of the issue itself, but that, acting upon the supposition that substantial justice has not been done by reason of some mistake or inadvertence of the jury, simply gives parties another trial. As to how often the court would be justified in granting a new trial on the same testimony in the same case is a question to be determined by the appellate court in passing upon the proper exercise of such discretion on the part of the trial court. Under this theory of law, however, the ultimate decision upon the question of fact involved is the province of the jury Bal. Code, sec. 4994 (Rem. Comp. Stat., sec. 340) This section, it will be observed, deals alone with

[45] Rem. Comp. Stat. Vol. 1, sec. 399, sub. div. 7. "The former verdict or other decision may be vacated and a new trial granted, on the motion of the party aggrieved, for any of the following causes, materially affecting the substantial rights of such party" Sub. div. 7 "Insufficiency of the evidence to justify the verdict or the decision, or that it is against the law"

[46] See note 15, *supra*.

[47] See note 15, *supra*.

[48] See note 41, *supra*.

> the legal sufficiency of the evidence, not taking into account at all its probative sufficiency That is to say, if the evidence offered, if admitted to be true, is not legally sufficient to sustain a verdict, there is nothing for the jury to pass upon, and it becomes the duty of the trial court to discharge the jury and render the judgment which the law prescribes.[49]

And in the later case of *Odalovich v. Weir*,[50] decided in 1924, the Supreme Court reversed a judgment rendered in favor of defendant on a verdict directed by the lower court in the following language:

> "I believe it is my plain duty here to grant this motion (to direct verdict) in consideration of all the evidence of the case. If the jury were to consider this evidence and return a verdict in favor of plaintiff, it would be obliged to set it aside on the grounds that the testimony is so overwhelming against plaintiff that the verdict could not be based on evidence."

In considering the statement of the trial court above quoted the Supreme Court said (p. 58)

> "There was a conflict in the evidence. The trial court in considering the testimony was satisfied beyond a reasonable doubt that the driver of the machine was negligent.
>
> This, however, would be ground sufficient for the granting of a new trial, but would in no sense be sufficient ground for directing a verdict. Granting a new trial is within the discretion of the trial court. Sustaining a motion for an instructed verdict is not discretionary [51] The former puts an end to the litigation but allows another trial of the issues and facts in controversy, while the latter finally determines the rights of the parties."

Perhaps the most illustrative case in this state demonstrating the effect and operation of our statute providing for a challenge to the sufficiency of the evidence and its relation to the province of the trial court in directing a verdict is that of *Spokane & Idaho Lbr*

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[49] The Supreme Court of Washington has repeatedly held without exception that judgments granted under this section are judgments upon the merits, and become therefore as to later trials upon the same facts *"res adjudicata." Spokane & Idaho Lbr Co. v. Loy*, 21 Wash. 510, 58 Pac. 672 (1899) *Bartlett v. Seehorn*, 25 Wash. 261, 65 Pac. 185 (1901) *Weir v. Seattle Elec.*, note 38, *supra*, *Sweeny v. Waterhouse & Co.*, 43 Wash. 61, 86 Pac. 46 (1906), *McGuire v. Bryant Lbr and Shingle Co.*, 53 Wash. 425, 102 Pac. 237 (1909).

[50] 132 Wash. 57, 231 Pac. 170.

Co. v. Loy,[52] decided in 1899. That case presented an action by the respondent against the principal and his sureties on a statutory bond given by a contractor (Loy), who agreed to construct a public bridge in and for the city of Spokane, to recover a balance alleged to be due for lumber sold and delivered to such contractor. It was shown at the trial that the contractor, Loy, assigned his contract with the city, and all his rights and interest therein, to one Boyd, and that the sureties in the bond, other than the appellants here, consented to such assignment, and agreed in writing to continue bound thereby The presumption was thus raised that the appellants did not consent to such assignment, and, if they did not, it is clear that they were not liable to the respondent for the value of any lumber furnished to the assignee. It further appeared in proof that the respondent furnished some lumber to Boyd after the assignment, and after Loy had ceased to work upon the bridge or direct the same. There was also evidence tending to show that a considerable amount of lumber was furnished by the respondent to Loy himself, while in charge of the construction of the bridge, and it would therefore seem that there was before the court the question of liability of the appellant, Loy, and the extent thereof. Under these facts appellant, Loy, moved for judgment, the denial of which was assigned as error. The trial court, however, took the case from the jury under authority of Rem. Comp. Stat., sec 340 (see note 46 *supra*) and directed judgment for the plaintiff, which action of the court is also assigned as error. The appellate court in reversing the judgment, for error committed by the trial court in taking the case from the jury, said

> "No doubt the trial court based its action on Rem. and Bal. Code, sec. 4994 (Rem. 340), which is as follows (Rem. 340 quoted, note 46, supra) We do not think it was the intention of the legislature in enacting this statute to empower the superior courts of this state to determine matters of fact such as are usually determined by the jury but simply to authorize the taking of a case from the jury when the facts are so clearly established that the court can see, as a matter of law, what the verdict and decision should be."

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[51] Accord: *State c. Jukich*, 135 Wash. 682, 239 Pac. 207 (1925) *Roe v. Standard Furniture Co.*, 41 Wash. 546, 83 Pac. 1109 (1906) *Brown v. Walla Walla*, 76 Wash. 670, 136 Pac. 1166 (1914) *Washington Trust Co. v. Kyes*, 88 Wash. 287, 152 Pac. 1029 (1915)

[52] 21 Wash. 502, 58 Pac. 672. See also, *Dunkle v. Spokane Falls & N. P R. R. Co.*, 20 Wash. 254, 55 Pac. 51 (1898)

Further,

> " the state constitution declares the right of trial by jury shall remain inviolate, and to take a case from the jury when there are doubtful questions of fact to be determined, would be to deprive a non-assenting party of this constitutional right. In the case at bar it was the province of the jury whether the appellants were liable, and in what sum if any, and the court should not have assumed to determine these facts from the evidence presented."

There can be no doubt, then, from the cases examined, that the rule appertaining in Washington is to the effect, that upon a motion for a nonsuit, or directed verdict, as exercised at common law, or a challenge to the sufficiency of the evidence as provided by statute,[53] or on motion for judgment notwithstanding the verdict, the question raised is not one calling for a decision based on the court's discretion after weighing the facts, but rather devolves upon the court the plain duty of determining whether it shall take the case from the jury and decide the case as a matter of law, upon consideration of the evidence and all inferences reasonably flowing therefrom. And such motions admit the truth of the plaintiff's evidence, and all inferences that can reasonably be drawn therefrom and the evidence must be construed most strongly against the defendant.[54] In other words, such a motion cannot be granted unless there is neither substantial evidence, nor reasonable inference from evidence in support of the verdict, or possible verdict.

Accordingly, then, a proponent (or defendant in case of affirmative defense or counterclaim) who has made out a prima facie case by evidence is entitled to have the issue submitted to a jury, not withstanding an overwhelming preponderance of contradictory evidence, and notwithstanding that a verdict in his favor would have been set aside. Or quoting Judge Fullerton, in the case of *Henrickson v. Smith*,[55] decided in 1920

> "By express provision of the constitution of the state, and by the general laws, a litigant has the absolute right to have disputed questions of fact submitted to the determination of a jury The appellate court, as well as the trial court, has power to see that such questions are prop-

[53] See note 15, *supra*.

[54] *Romano v. Short Line Stage Co.*, 142 Wash. 419, 253 Pac. 657 (1927) *Caughran v. Kahan*, 86 Wash. 356, 150 Pac. 445 (1915) *Harris v. Saunders*, 108 Wash. 195, 182 Pac. 949 (1919).

[55] 111 Wash. 82, 189 Pac. 550.

> erly submitted to the jury, and it is within the power of the trial court to set aside a verdict which he is convinced is contrary to the evidence, and submit the disputed question to another jury But this is the limit of the power. Judges of courts cannot without violation of the fundamental law substitute their opinions on disputed questions of fact, for the opinions of the juries and enter judgment contrary to the verdicts of such juries."

And conversely, as stated by Judge Mount in the case of *Leghorn v. Review Publishing Co.*,[56] the general rule would seem to be that (p. 632)

> "Where there is no substantial conflict or dispute in evidence and where the evidence is certain and incontrovertible, and but one conclusion can be reasonably drawn therefrom the question then becomes a question for the court and not for the jury "[57]

The test, then, is one of reasonableness. If reasonable minds might reach contrary conclusions upon the evidence, the case cannot be taken from the jury [58] If reasonable minds cannot differ as to the conclusion to be drawn from the evidence, after giving the most favorable construction to the evidence and all inferences reasonably flowing therefrom, the case should be taken from the jury [59]

It seems plain that substantially the same test of reasonableness is applied both for the purpose of directing a verdict and granting

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[56] 31 Wash. 621, 72 Pac. 485 (1903).

[57] As to when verdict should be directed generally see: *Clancy v. Reis*, 5 Wash. 371, 31 Pac. 971 (1893) *Wadhams v. Page*, 6 Wash. 103, 32 Pac. 1068 (1893) (defendant admitted indebtedness, but failed to establish valid defense) (no conflict in proofs) *Underwood v. Stack*, 15 Wash. 497, 46 Pac. 1031 (1896) 19 Wash. 108, 52 Pac. 526, (no disputed evidence on material point) *Pacific Natl. Bk. v. Aetna Life*, 33 Wash. 428, 74 Pac. 590 (1903) (evidence for plaintiff clear and undisputed) *Gray's Harbor Boom Co. v. Lounsdale*, 36 Wash. 198, 78 Pac. 904 (1904) (insufficiency of evidence) *Adams v. Peterman Mill Co.*, 74 Wash. 484, 92 Pac. 339 (1913) (establish cause of action) *Jensen v. Williams*, 72 Wash. 606, 131 Pac. 204 (1913) (no substantial evidence supporting material issues) *Harris v. Saunders*, 108 Wash. 195, 182 Pac. 949 (1919)

When verdict should not be directed see, (disputed questions of fact) *Brookman v. State Ins. Co.*, 18 Wash. 308, 51 Pac. 395 (1897) (doubtful questions of facts) note 49, *supra.* (directed verdict refused where conflict was slight) *Menasa Wooden Ware Co. v. Nelson*, 45 Wash. 543, 88 Pac. 1018 (1907).

[58] *Norris-Short Co. v. Everson Mercantile Company*, 103 Wash. 399, 174 Pac. 645 (1918) *Atwood v. Washington Water Power Co.*, 79 Wash. 427, 140 Pac. 343 (1914).

[59] *Golay v. Northern Pac. Ry Co.*, 105 Wash. 132, 177 Pac. 804, 181 Pac. 700; *Ramano v. Short Line Stage Co.*, 142 Wash. 419, 253 Pac. 657 (1927).

a new trial, the difference being that in determining whether the court may direct a verdict the test is applied only to that part of the evidence favorable to proponent's case, whereas, in determining whether a verdict may be set aside and a new trial granted, the test is applied to all evidence,[60] and further that in the first case the court may not weigh evidence, whereas in the second case it may, that is to say, in the first case the judge may not oppose his opinion on the facts against that of the jury, but must determine whether all reasonable men can come to only one conclusion, while in the second case he can give effect to his personal opinion that the verdict is unreasonable, even though all men might not agree with the judge in such opinion.

It is well settled law in this state that a verdict may be directed for the proponent as well as against him.[61] True, a verdict will be directed for the proponent only when there is uncontradicted testimony clearly establishing proponent's case. But it is submitted that the real reason a verdict is directed in such a case is not because the evidence is uncontradicted, but because it would be unreasonable not to believe uncontradicted testimony If the uncontradicted evidence happens to consist of testimony the truth of which seems improbable the circumstances would justify the jury in not believing it, the courts would no doubt submit the case to the jury on the question of credibility alone.

If, then, a verdict may be directed on the ground that it would be unreasonable to disbelieve testimony, why should not a verdict be directed if it be unreasonable to believe testimony? This is exactly what the court does when it sets aside a verdict as against the weight of the evidence. For, when a verdict is set aside as against the weight of the evidence, the court is saying that it was unreasonable for the jury to believe the proponent's evidence in view of the overwhelming evidence on the other side.

The decision in the *"Weir case"* [62] has definitely established in the state the distinction that for the purpose of setting aside a verdict the court may weigh the evidence, but for the purpose of directing a verdict the court cannot weigh the evidence.

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[60] *Clark v. G. N. Ry.*, 37 Wash. 537, 79 Pac. 1108 (1905) *Tacoma v. Tacoma Light & Water*, 16 Wash. 288, 47 Pac. 738 (1897), *Shamek v. Metropolitan Bldg. Co.*, 127 Wash. 336, 220 Pac. 816 (1923).

[61] *Clancy v. Reis* (1893) note 57, *supra*, *Sessions v. Warwick*, 46 Wash. 165, 89 Pac. 483 (1907) *Wadhams v. Page*, note 57, *supra*, *Squires v. Sumwalt*, 6 Wash. 103, 32 Pac. 1068 (1895) *Pacific Natl. Bank v. Aetna Life*, note 57, *supra* (1903).

[62] Note 38, *supra*.

From this rule some incongruity may result. For example, a jury may render an unreasonable verdict against the weight of the evidence, which the court promptly sets aside. A second jury renders the same verdict under substantially the same testimony The court, perhaps rather reluctantly, again sets it aside. A third jury renders the same verdict. The court may again set it aside, though actually after a third verdict the court generally yields. Thus, the case is decided on the basis of endurance in a contest between the jury and court!

In the case of *McCabe v. Lingberg*,[63] decided in 1918, just such a question was presented to the court. There was an appeal from an order granting a new trial upon the ground of insufficiency of the evidence to sustain the verdict. It appears that this was the second new trial granted on the same grounds, and it was contended that since the evidence in both trials was substantially the same, the trial judge was without power to enter the order now complained of. In deciding that the power of the trial court to grant a new trial for insufficiency of the evidence to sustain the verdict is not limited or exhausted by granting one or more new trials, Judge Morris, speaking for the court, and quoting with approval from the case of *Clark v. Jenkins*, 162 Mass. 379, 38 N. E. 974, said

> "In this commonwealth, there is no rule of law limiting the number of times that a judge may set aside a verdict as against the evidence. On the other hand, it has been recognized that in an extraordinary case the court may set aside any number of verdicts that might be returned."

and further in the same opinion in discussing cases in New York[64] under a statute similar to our own (note 45, *supra*)

> " the courts of that state (N. Y) in cases where such ruling appeared proper have set aside successive verdicts as against the weight of the evidence, or sustained the granting of two or more new trials upon the ground of insufficiency of the evidence to sustain the verdict."

In the case of *Gnecco v. Pederson* [65] judgment based upon a third verdict was set aside and a new trial granted. And in another

[63] 99 Wash. 430, 169 Pac. 840. Accord: *Thomas v. Hillis*, 70 Wash. 54, 126 Pac. 62 (1912).

[64] *McCann v. N. Y & Q. C. Ry. Co.*, 73 App. Div. 305, 76 N. Y. Supp. 684 (1902) *Merowitz v. Multoffsky*, 134 N. Y. Supp. 588 (1912) *Lacs v. James Breweries*, 107 App. Div. 250, 95 N. Y. Supp. 25 (1905) (latter case citing many others.)

New York case[66] it was said, after pointing out that as many as three successive verdicts may and have been set aside

> "The courts, however, recognize that where issues of fact must be submitted to a jury, it becomes necessary for the courts sooner or later to acquiesce in the verdict in order that the litigation may come to an end, and that the determination of the issues in a single action may not occupy the attention of the courts to an unreasonable extent, and while there is no definite rule to that effect, it may be said that the preponderance of judicial authority is in favor of allowing the second verdict to stand. "

Thus a verdict which the court admittedly believes to be unreasonable and therefore wrong, is sooner or later permitted to stand in order to save the time of the courts.

To the rule that the court cannot decide ultimate questions of fact in a jury trial, such questions being solely for the jury, there is the one exception, that where both parties ask for a directed verdict, they waive the verdict of the jury and submit the cause for decision by the trial judge, who is then authorized to enter such judgment as the evidence warrants.[67] But it has been indicated that even in such a case, the judge may still submit the cause to the jury and that it becomes binding upon him to the same extent as in other law cases.[68]

c. Power of Appellate Court with Respect to the Sufficiency of Evidence

The Supreme Court of Washington has no power to weigh evidence and to grant new trials on the ground that the verdict is against the weight of the evidence. This power resides solely in the trial court. The appellate of this state can determine only whether there is any substantial evidence (more than a mere "scintilla") to support the verdict. If so, the verdict must be allowed to stand, even, if the appellate court, if it had the power to consider the evidence originally in place of the jury, might have reached a contrary result.

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[66] 154 N. Y. Supp. 12 (1915).

[67] *Gutman v. Weisbarth*, 194 App. Div. 351, 185 N. Y. 261 (1920).

[67] *Sevier v. Hopkins*, 101 Wash. 404, 172 Pac. 550 (1918).

[68] *Peoples State Bank v. Driscoll*, 143 Wash. 461, 255 Pac. 134 (1927) As to whether this rule applies to the statutory challenge to the sufficiency of the evidence; see discussion and proposals of Revision Committee, referred to in note 15, *supra*.

Thus, it is said in *Strandell v. Moran*[69]

> "True, the appellants say that there was no substantial testimony contradicting their contention, but we find against it the positive testimony of the respondent's agent. Whether his testimony was true or false was for the jury and trial judge to determine. *This court has no authority to weigh the evidence.*

And in *Brandt v. Northern Pacific R. Co.*[70] it is said

> "That we, sitting as jurors, might have found otherwise is no answer to the fact that there was substantial evidence before the jury to the effect indicated. And the jury having believed that evidence, rather than that which contradicted it, we are powerless to interfere."

However, in the event that there is no substantial evidence to support the verdict and the appellate court deems that a motion for a nonsuit, directed verdict, challenge to the sufficiency of evidence, or judgment notwithstanding the verdict has been improperly denied, it will itself cause the proper order to be entered and conclude the litigation.[71]

The foregoing rule, however, is not the rule in the federal courts. The Supreme Court of the United States has ruled, construing the seventh amendment, that upon determining that trial judge has erred in refusing to direct a verdict, the appellate court cannot enter a final judgment in favor of the party who was entitled to a directed verdict, but can only remand the cause for a new trial.[72]

STANLEY B. LONG.*

[69] 49 Wash. 533, 95 Pac. 1106 (1908).

[70] 105 Wash. 138, 177 Pac. 806 (1919) and see cases cited Rem. Wash. Dig. Title "Appeal & Error" sec. 413.

[71] *Woolf v. Washington R. & Nav. Co.*, 37 Wash. 491, 79 Pac. 997 (1905) *Golay v. Northern Pac. R. Co.*, 105 Wash. 132, 177 Pac. 807, 181 Pac. 700 (1919) *Jones v. Harris*, 122 Wash. 69, 210 Pac. 22 (1922).

[72] *Slocum v. New York Life Ins. Co.*, 228 U. S. 364 (1913) *Myers v. Pittsburg Coal Co.*, 233 U. S. 184, 189 (1914) *Fidelity Title Co. v. Dubois Electric Co.*, 253 U. S. 212 (1920).

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