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## The Rise of Directed Verdict: Jury Power in Civil Cases Before the Federal Rules of 1938

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# The Rise of Directed Verdict: Jury Power in Civil Cases Before the Federal Rules of 1938

Renée Lettow Lerner\*

## ABSTRACT

*Jury practice in the state and federal courts evolved dramatically in the nineteenth and early twentieth centuries. Around the time of the ratification of the Bill of Rights in 1791, important legal thinkers praised the civil jury as a bulwark against judicial tyranny. By the advent of the Federal Rules of Civil Procedure in 1938, many commentators regarded the civil jury as an antiquated nuisance. Diminishment of the jury and open exercise of judicial power, encouraged in the Federal Rules by procedures such as summary judgment, would not have been possible without earlier changes in jury practice. Two major changes were the rise of directed verdict procedure and the related judgment notwithstanding the verdict. These mechanisms allowed a judge to give a binding instruction to a jury, or to enter a judgment contrary to the jury's decision.*

*This Study reveals that railroads revolutionized the law of jury control. Changes in directed verdict were part of a larger program of jury reform beginning in the mid-nineteenth century in England, the states, and the federal government. Because of growing numbers of complicated personal injury suits against railroads, and because of perceived jury bias in those cases, many judges sought to control juries more efficiently. Directed verdicts began to replace new trials. Opposition arose, but the overall trend was toward greater judicial control of juries. The striking changes in jury practice described in this Article suggest difficulties in maintaining a consistent jury trial right by constitutional requirement.*

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## INTRODUCTION

Civil jury practice in the state and federal courts evolved dramatically in the nineteenth and early twentieth centuries. A major part of that evolution was the directed verdict and the related judgment notwithstanding the verdict. These mechanisms allowed a judge to give a binding instruction to a jury, or to enter a judgment contrary to the jury's decision.<sup>1</sup> Courts justified these procedures on the theory that the facts were for the jury to determine and the law for the judge—a line that proved to be highly malleable.

Previous scholarly studies of directed verdict have emphasized the procedure's early history in England and the United States, its constitutionality under the Seventh Amendment, and its development

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<sup>1</sup> The current versions in the Federal Rules are Federal Rules of Civil Procedure 50(a) and (b) (Judgment as a Matter of Law and Renewing the Motion After Trial). I do not address directed verdict in criminal cases in this Article. The practice existed in criminal cases, but it was rarer than in civil cases. Courts generally allowed juries more power in criminal cases than in civil, in part through the doctrine of double jeopardy. In certain circumstances, judges directed verdicts for criminal defendants; in some jurisdictions, judges even directed verdicts of guilty. *See, e.g.,* *People v. Richmond*, 26 N.W. 770, 770 (Mich. 1886); *Recent Decisions, Criminal Law and Procedure—Jury Trial—Directed Verdict of Guilty—Michigan Rule*, 39 MICH. L. REV. 1234, 1234 (1941).

in the federal courts.<sup>2</sup> In general, scholarship on American civil procedure has focused on the period before 1791—because of the Seventh Amendment’s historical test<sup>3</sup>—and on the advent and consequences of the Federal Rules of Civil Procedure in 1938 and after. The period in between has been comparatively neglected.<sup>4</sup> There is a vast difference, however, between the procedural worlds of 1791 and 1938. The diminishment of the jury and the open exercise of judicial power encouraged by the Federal Rules in procedures such as summary judgment would not have been possible without the changes in jury practice made in the nineteenth and early twentieth centuries. This Study helps to fill the gap, to explain how the Federal Rules and the modern procedural world became possible.

Modest jury controls existed in 1791, but around that time major figures in the American legal world lauded the power of civil juries as a bulwark against tyranny.<sup>5</sup> In 1771, John Adams wrote that, in order

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<sup>2</sup> See, e.g., William Wirt Blume, *Origin and Development of the Directed Verdict*, 48 MICH. L. REV. 555 (1950); Frank Warren Hackett, *Has a Trial Judge of a United States Court the Right to Direct a Verdict*, 24 YALE L.J. 127 (1915); Edith Guild Henderson, *The Background of the Seventh Amendment*, 80 HARV. L. REV. 289 (1966); Ellen E. Sward, *The Seventh Amendment and the Alchemy of Fact and Law*, 33 SETON HALL L. REV. 573 (2003); Ann Woolhandler & Michael G. Collins, *The Article III Jury*, 87 VA. L. REV. 587 (2001). For useful sources on state practice, see ROBERT W. MILLAR, CIVIL PROCEDURE OF THE TRIAL COURT IN HISTORICAL PERSPECTIVE 305–09 (1952); 9 JOHN HENRY WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW 296–99 (3d ed. 1940).

<sup>3</sup> See *Parsons v. Bedford*, 28 U.S. (3 Pet.) 433, 446–48 (1830); *United States v. Wonson*, 28 F. Cas. 745, 750 (C.C.D. Mass. 1812) (No. 16,750).

<sup>4</sup> Some exceptions are Amalia Kessler, Stephan Landsman, John Leubsdorf, William Nelson, and Ellen Sward. See, e.g., WILLIAM E. NELSON, AMERICANIZATION OF THE COMMON LAW: THE IMPACT OF LEGAL CHANGE ON MASSACHUSETTS SOCIETY, 1760–1830 (1975); Amalia D. Kessler, *Our Inquisitorial Tradition: Equity Procedure, Due Process, and the Search for an Alternative to the Adversarial*, 90 CORNELL L. REV. 1181 (2005); Stephan Landsman, *The Civil Jury in America: Scenes from an Unappreciated History*, 44 HASTINGS L.J. 579 (1993); John Leubsdorf, *Toward a History of the American Rule on Attorney Fee Recovery*, LAW & CONTEMP. PROBS., Winter 1984, at 9; William E. Nelson, *Civil Procedure in Twentieth-Century New York*, 41 ST. LOUIS U. L.J. 1157 (1997); Sward, *supra* note 2. On the paucity of scholarship about the history of the American civil jury (together with interesting observations on that history), see Lawrence M. Friedman, *Some Notes on the Civil Jury in Historical Perspective*, 48 DEPAUL L. REV. 201, 201–02 (1998).

<sup>5</sup> The case of *Erving v. Cradock*, in which a Boston civil jury nullified the unpopular customs laws by finding against a customs officer who had seized a merchant’s ship carrying smuggled cargo, demonstrated to American colonists the power and value of the civil jury. *Erving v. Cradock* (1761), reprinted in FRANCIS BERNARD, *Governor Francis Bernard to the Lords of Trade*, 6 Aug. 1761, 2 BERNARD PAPERS 46, 47, reprinted in JOSIAH QUINCY, JR., REPORTS OF CASES ARGUED AND ADJUDGED IN THE SUPERIOR COURT OF JUDICATURE OF THE PROVINCE OF MASSACHUSETTS BAY BETWEEN 1761 AND 1772, at 553–55 (Boston 1865). American colonists resented the expansion of the jurisdiction of admiralty courts, which sat without a jury, to enforce the customs laws. See, e.g., *Resolves of the Stamp Act Congress, October 1965*, in RICH-

to correct judicial overreaching, it was not only a juror's "right but his Duty . . . to find the Verdict according to his own best Understanding, Judgment and Conscience, tho in Direct opposition to the Direction of the Court."<sup>6</sup> A decade later Thomas Jefferson wrote likewise.<sup>7</sup> Rights to civil juries were considered important enough to be enshrined in state constitutions and to be called "sacred."<sup>8</sup> The lack of a civil jury guarantee in the federal Constitution posed a serious obstacle to ratification, cured quickly by the Seventh Amendment.<sup>9</sup> In the first jury trial conducted by the United States Supreme Court, Chief Justice John Jay charged a civil jury in 1794 that, although the jury usually decided the facts and the judge the law, the jurors had "a right to take upon yourselves to judge of both, and to determine the law as well as the fact in controversy."<sup>10</sup>

By the early twentieth century, however, many legal commentators and judges regarded civil juries less as a bulwark against tyranny than as a nuisance. In 1914, Edson Sunderland, a principal drafter of

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ARD MIDDLETON, *COLONIAL AMERICA: A HISTORY, 1585–1776*, at 452 (2d. ed. 1996) ("That trial by jury is the inherent and invaluable right of every British subject in these colonies. . . . [The Stamp Act] and other Acts, by extending the jurisdiction of the courts of admiralty beyond its ancient limits, have a manifest tendency to subvert the rights and liberties of the colonists.").

<sup>6</sup> John Adams, Adams' Diary Notes on the Right of Juries, 12 Feb. 1771, in 1 *LEGAL PAPERS OF JOHN ADAMS* 228, 230 (L. Kinvin Wroth & Hiller B. Zobel eds., 1965).

<sup>7</sup> Jefferson stated:

[I]t is usual for the jurors to decide the fact, and to refer the law arising on it to the decision of the judges. But this division of the subject lies with their discretion only. And if the question relate to any point of public liberty, or if it be one of those in which the judges may be suspected of bias, the jury undertake to decide both law and fact.

THOMAS JEFFERSON, *NOTES ON THE STATE OF VIRGINIA* 140 (J.W. Randolph ed., 1853).

<sup>8</sup> The Virginia Declaration of Rights of 1776, for example, declared: "That in controversies respecting property, and in suits between man and man, the ancient trial by jury is preferable to any other, and ought to be held sacred." VA. DECLARATION OF RIGHTS OF 1776, § 11 (Jun. 20, 1776), reprinted in 10 *SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS* 50 (William Swindler ed., 1979).

<sup>9</sup> Concern about the lack of a civil jury right in the federal Constitution was a major unifying theme of the Anti-federalist movement. Matthew P. Harrington, *The Economic Origins of the Seventh Amendment*, 87 *IOWA L. REV.* 145, 182, 185 (2001); Jack N. Rakove, *The Origins of Judicial Review: A Plea for New Contexts*, 49 *STAN. L. REV.* 1031, 1064 (1997). Debtors' fears that creditors would sue them in federal courts sitting without juries caused significant opposition to the proposed Constitution, particularly in Southern states. Harrington, *supra*, at 188–89; Charles W. Wolfram, *The Constitutional History of the Seventh Amendment*, 57 *MINN. L. REV.* 639, 679–705 (1973).

<sup>10</sup> *Georgia v. Brailsford*, 3 U.S. (3 Dall.) 1, 4 (1794). The Court was sitting in original jurisdiction. For a description of the procedure, see 6 *THE DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES, 1789–1800*, at 84 n.70 (Maeva Marcus ed., 1998).

the Federal Rules of 1938,<sup>11</sup> published a long article entitled *The Inefficiency of the American Jury*.<sup>12</sup> He remarked: “Men temporarily called from the ordinary affairs of life, untrained in the law, are incapable of performing the functions of judges in any but the most primitive communities.”<sup>13</sup> Judges strove to control the law in civil cases, and through ever more precise rules transformed what had been issues of fact for the jury into issues of law for the judge. Far from allowing a jury to find the law in opposition to the direction of the court, courts approved of trial judges threatening jurors with contempt for rejecting a directed verdict.<sup>14</sup>

This Study examines changes in directed verdict as part of a larger program of jury reform beginning in the mid-nineteenth century in England, the states, and the federal government. It is hardly an exaggeration to say that railroads revolutionized the law of jury control. In all these jurisdictions, the numbers of personal injury suits rose dramatically as railroad tracks spread.<sup>15</sup> Railroads’ ability to transport goods and persons quickly and cheaply made them vital to the new commercial and industrial economy.<sup>16</sup> As they steamed along, however, they killed or injured workers, passengers, passersby, crops, and livestock in large numbers.<sup>17</sup> They therefore provoked popular hostility.<sup>18</sup> Judges in all these jurisdictions faced the problem of how to process large numbers of complicated personal injury cases, compensate victims, and maintain the financial viability of railroads confronted with hostile juries.<sup>19</sup> The solution was to sharply limit jury power.<sup>20</sup> In particular, judges sought to reduce the number of new trials and to control juries more efficiently through nonsuits and directed verdicts.<sup>21</sup>

Not all judges agreed with the program of limiting jury power. Although many judges were clearly concerned about adjudicatory ef-

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<sup>11</sup> Stephen N. Subrin, *Fishing Expeditions Allowed: The Historical Background of the 1938 Federal Discovery Rules*, 39 B.C. L. REV. 691, 697–729 (1998).

<sup>12</sup> Edson R. Sunderland, *The Inefficiency of the American Jury*, 13 MICH. L. REV. 302 (1914).

<sup>13</sup> *Id.* at 303.

<sup>14</sup> *See, e.g.*, Curran v. Stein, 60 S.W. 839 (Ky. 1901).

<sup>15</sup> *See* LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 300 (2d ed. 1986); *infra* Part III.A.6.

<sup>16</sup> *See id.*

<sup>17</sup> *See id.*

<sup>18</sup> *See id.*

<sup>19</sup> *See, e.g.*, *infra* Part III.A.6.

<sup>20</sup> *See infra* Part III.A.

<sup>21</sup> *See infra* Part III.A.5–6.

iciency and about jury bias against corporations, others worried more about compensation for the numerous persons injured in railroad and other industrial accidents.<sup>22</sup> Populist movements influenced legislatures as well, and various statutes and even constitutional provisions attempted to restore jury power in personal injury cases.<sup>23</sup>

Part I of the Article begins with a brief examination of English methods of jury control in the late eighteenth century. Part I also addresses the difficulties posed by the remedy of new trial—the most widespread method for correcting jury error in the United States in the early nineteenth century. The Article in Part II then turns to directed verdict, and discusses its variations in different states in the first half of the nineteenth century. During this period, a growing desire for finality and clarity in commercial cases led to more directed ver-

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<sup>22</sup> Scholars have vigorously debated the goals and effects of nineteenth-century tort law. *See, e.g.*, FRIEDMAN, *supra* note 15, at 467–87 (arguing that many rules of tort law in the nineteenth century protected enterprises, especially railroads, at the expense of plaintiffs, but that judges, juries, and legislatures increasingly favored compensation of plaintiffs as the century wore on); MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1780–1860*, at 85–101 (1977) (arguing that the development of negligence doctrine in the nineteenth century undermined an earlier “presumption of compensation for injury” and substantially reduced entrepreneurial liability, amounting to a subsidy for economic development); MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1870–1960: THE CRISIS OF LEGAL ORTHODOXY* 13–14, 43–44, 51–59 (1992) (arguing that influential late-nineteenth-century legal writers tried to construct a system of private law free from the dangers of redistribution, and embraced theories of negligence and rejected strict liability of enterprise); PETER KARSTEN, *HEART VERSUS HEAD: JUDGE-MADE LAW IN NINETEENTH-CENTURY AMERICA* 79–143 (1997) (criticizing Morton Horwitz and Lawrence Friedman, and arguing that tort rules such as negligence and the fellow servant rule were not new in the nineteenth century, and that courts often applied the rules, or allowed juries to apply the rules, in ways that permitted injured plaintiffs to recover); JOHN F. WITT, *THE ACCIDENTAL REPUBLIC: CRIPPLED WORKINGMEN, DESTITUTE WIDOWS, AND THE REMAKING OF AMERICAN LAW* 43–70 (2004) (describing a shift during the nineteenth century from a focus on individual autonomy to compensation, particularly for dependent wives and children); Gary T. Schwartz, *Tort Law and the Economy in Nineteenth-Century America: A Reinterpretation*, 90 *YALE L.J.* 1717, 1720 (1981) (criticizing Horwitz and Friedman, examining tort cases in California and New Hampshire, and concluding that “the nineteenth-century negligence system was applied with impressive sternness to major industries and that tort law exhibited a keen concern for victim welfare,” with the exceptions of employers’ liability and governmental liability in California); Jed H. Shugerman, *A Watershed Moment: Reversals of Tort Theory in the Nineteenth Century*, 2 *J. TORT L.*, no. 1, art. 2 (2008) (arguing that courts in the 1870s and 1880s justified a negligence rule partly by economic arguments, but around the turn of the century justified strict liability rules for enterprises on moral grounds); Stephen F. Williams, *Transforming American Law: Doubtful Economics Makes Doubtful History*, 25 *UCLA L. REV.* 1187 (1978) (arguing that the requirement of fault and the thread of utilitarian analysis is found far back in the English common law, and that Horwitz distorts the concept of a subsidy).

<sup>23</sup> *See infra* Part III.C.

dicts for defendants. Some states adopted a variation known as instructing the jury “as in case of a nonsuit.”<sup>24</sup>

In the second half of the nineteenth century, as described in Part III, directed verdict practice changed significantly. Courts changed the standard for using the procedure, coinciding with the spread of railroads. The change in standard for directed verdict also tended to follow closely the abolition of disqualification of witnesses for interest.<sup>25</sup> New York and English courts were among the first to modify the procedure to allow directed verdict even when there was some evidence for the opposing party.<sup>26</sup> Federal courts then changed the standard, followed by state courts other than New York.<sup>27</sup> Directed verdict thus evolved from a strict standard to a more permissive one—an evolution that occurred for other procedures of jury control or avoidance at different times. For example, in the early nineteenth century, the standard for ordering a new trial for verdict against evidence evolved from being allowed only if there was no evidence at all for the opposing party, to being permitted even if there was evidence on the other side.<sup>28</sup> Likewise, in the twentieth century, the standard for granting summary judgment under Rule 56 of the Federal Rules of Civil Procedure was interpreted more permissively.<sup>29</sup>

Part III also discusses substantive tort doctrines that enabled courts to direct more verdicts for defendant railroads, including contributory negligence and the fellow servant rule. Use of these doctrines provoked a backlash. Some courts, together with legislatures and even constitutional conventions, modified or abolished these barriers to plaintiffs’ recovery. Constitutional provisions in two states attacked directed verdicts directly, and provided that the issues of contributory negligence and assumption of risk must be decided by juries.<sup>30</sup> The U.S. Supreme Court issued significant opinions concern-

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<sup>24</sup> See *infra* Part II.F.

<sup>25</sup> See *infra* Part III.A.1.

<sup>26</sup> See *infra* Part III.A.2–3.

<sup>27</sup> See *infra* Part III.A.5–6.

<sup>28</sup> See Renée B. Lettow, *New Trial for Verdict Against Law: Judge-Jury Relations in Early Nineteenth-Century America*, 71 NOTRE DAME L. REV. 505, 542–46 (1996).

<sup>29</sup> See the summary judgment trilogy: *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986).

<sup>30</sup> ARIZ. CONST. art. XVIII, § 5; OKLA. CONST. art. XXIII, § 6; see also *infra* text accompanying notes 349–53.

ing both of these provisions.<sup>31</sup> A few state legislatures tried to bar directed verdicts, but these statutes met resistance in the courts.<sup>32</sup>

In the late nineteenth and early twentieth centuries, courts increasingly did away with the requirement that a judge actually direct a verdict and obtain agreement from a jury before judgment could be entered. The requirement had sometimes led to awkward confrontations between judges and recalcitrant jurors.<sup>33</sup> Appellate courts began to allow judgment to be entered on the mere decision to direct a verdict.<sup>34</sup> The pretense of jury power fell away, and judges exercised power ever more openly. These changes created a legal culture willing to accept novel practices such as the powerful summary judgment procedure in the Federal Rules of 1938.<sup>35</sup>

Difficulties began to arise because judges faced pressure to decide motions for directed verdict quickly, and they often erred by denying motions.<sup>36</sup> Although judges were willing to make changes in the procedure of directing a verdict, they hesitated to permit entry of judgment notwithstanding a jury's verdict.<sup>37</sup> As Part IV discusses, legislatures began to authorize both trial and appellate courts to grant judgment notwithstanding the verdict in 1895.<sup>38</sup>

Part V shows that the principal drafters of the Federal Rules of Civil Procedure were deeply interested in the new forms of jury control, including directed verdict. They wrote about them extensively in their academic work.<sup>39</sup> The drafters viewed civil juries as wasteful anachronisms.<sup>40</sup> The growing power of judges over jury verdicts allowed the drafters to take the next logical step: avoidance of jury trial

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<sup>31</sup> See *Herron v. S. Pac. Co.*, 283 U.S. 91 (1931); *Chi., Rock Island & Pac. Ry. Co. v. Cole*, 251 U.S. 54, 55–64 (1919); see also *infra* text accompanying notes 358–66.

<sup>32</sup> See *infra* Part III.C.3.

<sup>33</sup> See *infra* Part III.D.

<sup>34</sup> See, e.g., *Cahill v. Chi., Milwaukee & St. Paul Ry. Co.*, 74 F. 285 (7th Cir. 1896); see also *infra* note 464 and accompanying text.

<sup>35</sup> See FED. R. CIV. P. 56 (1938).

<sup>36</sup> See, e.g., *Dalmas v. Kemble*, 64 A. 559, 559 (Pa. 1906) (explaining the pressure on trial judges to decide directed verdict motions quickly); Robert L. Pierce, *Practice and Procedure—Reservations of Decision on Motion for Directed Verdict as Means of Avoiding Unnecessary New Trials*, 34 MICH. L. REV. 93, 93 (1935) (commenting on judges' errors in denying motions for directed verdict due to time pressure); see also *infra* text accompanying notes 477–79.

<sup>37</sup> See *infra* notes 483–84 and accompanying text.

<sup>38</sup> See, e.g., 1895 Minn. Laws 729–30; see also *infra* notes 485–88 and accompanying text.

<sup>39</sup> See, e.g., Charles E. Clark & Charles U. Samenow, *The Summary Judgment*, 38 YALE L.J. 423, 423 (1929); Charles E. Clark & Harry Shulman, *Jury Trial in Civil Cases—A Study in Judicial Administration*, 43 YALE L.J. 867 (1934); Edward R. Sunderland, *Directing a Verdict for the Party Having the Burden of Proof*, 11 MICH. L. REV. 198 (1913); Sunderland, *supra* note 12.

<sup>40</sup> See, e.g., Sunderland, *supra* note 12.

altogether. The Rules' provisions for extensive pretrial discovery, combined with a powerful new summary judgment procedure, allowed judges to decide issues without ever summoning a jury.<sup>41</sup> Although the original Advisory Committee had to be somewhat cautious in drafting Rule 50, concerning directed verdicts,<sup>42</sup> in the mid- and late-twentieth century the Advisory Committee amended the Rule to strip out any role for the jury and to make judicial power plain.<sup>43</sup>

The more aggressive use of directed verdicts in the late nineteenth and early twentieth centuries drew criticism from some commentators as violating constitutional rights to jury trial.<sup>44</sup> The dramatic evolution of jury practice described in this Article suggests difficulties in maintaining a consistent jury trial right by constitutional requirement. Judges have many ways to expand the realm of law at the expense of fact, and can devise many methods at different points in litigation to interpose judicial decisions. In addition to practices explicitly concerning taking a case from a jury, many features of the legal system strongly affect jury decisions and review of those decisions: the substantive law, the law of pleading, the complexity of disputes, the law of discovery, the cost of litigation and fee-shifting rules, methods of jury selection, the law of evidence, the power of the trial judge to comment on evidence at trial, and methods of recording testimony and bringing the record before an appellate court, just to name a few. All of these have changed greatly since the English common law practice of 1791. The procedural rights listed in the Bill of Rights can sound majestic, but they are subject to manipulation at many levels.

## I. BACKGROUND TO DIRECTED VERDICT

### A. *Jury Control in English Courts in the Eighteenth Century*

English judges had many ways to guide juries in the eighteenth century. The attaint had long been obsolete and *Bushell's Case* prohibited fining jurors for incorrect verdicts,<sup>45</sup> but English judges still could exercise considerable control. The most powerful tool was judi-

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<sup>41</sup> See *supra* Part V.

<sup>42</sup> FED. R. CIV. P. 50(a) (1938); see *infra* text accompanying notes 527–29.

<sup>43</sup> Amendments to Rules of Civil Procedure for the United States District Courts, 31 F.R.D. 587, 643 (1963); see *infra* notes 530–32 and accompanying text.

<sup>44</sup> See *infra* note 402. A different paper will address constitutional challenges and the courts' responses.

<sup>45</sup> *Bushell's Case*, (1670) 124 Eng. Rep. 1006 (C.P.) 1011–12, Vaughan 137, 147.

cial comment on the evidence.<sup>46</sup> Sometimes a judge's notes or a reported opinion described a trial judge as "directing" a verdict.<sup>47</sup> The jury usually found according to the judge's instructions and comments; in those rare cases in which the jury brought in a contrary verdict, the judge had the ability to grant a new trial for verdict against law or evidence.<sup>48</sup>

Several devices permitted a judge to avoid a jury verdict entirely. Demurrer to the evidence was one such tool, but its use declined in the late eighteenth century as oral testimony became increasingly important at trial.<sup>49</sup> A defendant, by demurrer to the evidence, could challenge the legal sufficiency of the evidence to maintain the plaintiff's case. English judges believed the procedure was especially appropriate in cases that turned on matters of record, deeds, or other writings.<sup>50</sup> Cases turning on oral testimony, however, proved a challenge for the procedure; it was hard to be certain what inferences to draw from oral testimony, with its potential conflicts and credibility questions. In *Cocksedge v. Fanshaw*<sup>51</sup> in 1779, Lord Mansfield stated that in demurring to the evidence, "the defendant admits every fact which the jury *could* have found upon the evidence" in favor of the plaintiff.<sup>52</sup> Demurrers to the evidence were rare in late-eighteenth-century practice.<sup>53</sup> The procedure's use further declined after the House of Lords' decision in *Gibson v. Hunter*<sup>54</sup> in 1793, which required the defendant to state in writing not only the evidence introduced by the plaintiff, but also the facts which such evidence might prove.<sup>55</sup> Few defendants wanted to be on record in this fashion.<sup>56</sup>

A different way to avoid a jury verdict was nonsuit of the plaintiff. Nonsuit in effect substituted for demurrer to the evidence, without the necessity for defendant to admit the truth of plaintiff's

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<sup>46</sup> See John H. Langbein, *The Criminal Trial Before the Lawyers*, 45 U. CHI. L. REV. 263, 285–86, 295 (1978).

<sup>47</sup> See JAMES OLDHAM, TRIAL BY JURY: THE SEVENTH AMENDMENT AND ANGLO-AMERICAN SPECIAL JURIES 12–13 (2006).

<sup>48</sup> *Id.* at 12; John H. Langbein, *Historical Foundations of the Law of Evidence: A View from the Ryder Sources*, 96 COLUM. L. REV. 1168, 1193 (1996).

<sup>49</sup> See MILLAR, *supra* note 2, at 298.

<sup>50</sup> JAMES B. THAYER, A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW 235–36 (1898).

<sup>51</sup> *Cocksedge v. Fanshaw*, (1779) 99 Eng. Rep. 80 (K.B.), 1 Dougl. 118.

<sup>52</sup> *Id.* at 88 (Lord Mansfield) (emphasis added); see *id.* at 88–89 (Buller, J.).

<sup>53</sup> OLDHAM, *supra* note 47, at 10.

<sup>54</sup> *Gibson v. Hunter*, (1793) 126 Eng. Rep. 499 (H.L.), 2 H. BL. 188.

<sup>55</sup> *Id.* at 509–10.

<sup>56</sup> See THAYER, *supra* note 50, at 235–36.

evidence. In an action in which the plaintiff had failed to make out a legally sufficient case, the court could direct a nonsuit or the plaintiff could move for one.<sup>57</sup> Although there has been some scholarly debate about whether an English judge could order a nonsuit without the plaintiff's consent, James Oldham has found that Mansfield was doing so.<sup>58</sup> Oldham also found that nonsuits were frequent, according to Mansfield's notes.<sup>59</sup>

Another device Mansfield frequently used was the "case stated" or "case reserved."<sup>60</sup> Under this procedure, the jury gave a verdict for the plaintiff, with a finding of damages, subject to the opinion of the court on a question of law.<sup>61</sup> The trial judge and counsel for the parties agreed on the statement of the case.<sup>62</sup> The legal question was then argued before the full court, and a judgment could be entered for defendant as a result, without another jury trial.<sup>63</sup> (If a verdict was for the defendant, a plaintiff could argue a question of law on a motion for new trial.<sup>64</sup>)

#### B. *Jury Control in the United States: The Problem of New Trial*

The most frequent procedure for correcting jury error in American courts was to order a new trial.<sup>65</sup> Use of other methods of correction declined. Demurrer to the evidence became rare in the federal courts and in many states when courts adopted the English rule of *Gibson v. Hunter*, requiring the defendant to admit in writing to adverse inferences from oral testimony.<sup>66</sup> (States whose courts did not adopt *Gibson v. Hunter* continued use of the demurrer, most notably Virginia.<sup>67</sup>) Most importantly, in many states in the nineteenth century, trial judges' power to comment on evidence to the jury was limited or curtailed.<sup>68</sup> With few other options for preventing or

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<sup>57</sup> MILLAR, *supra* note 2, at 299–300.

<sup>58</sup> OLDHAM, *supra* note 47, at 11–12. Henderson argued that an English plaintiff could not be nonsuited without his consent. Henderson, *supra* note 2, at 300.

<sup>59</sup> OLDHAM, *supra* note 47, at 10.

<sup>60</sup> *Id.* at 12–13; *see* Henderson, *supra* note 2, at 304.

<sup>61</sup> OLDHAM, *supra* note 47, at 10–11; Henderson, *supra* note 2, at 305–06.

<sup>62</sup> Henderson, *supra* note 2, at 305–06.

<sup>63</sup> *Id.*

<sup>64</sup> OLDHAM, *supra* note 47, at 13.

<sup>65</sup> Lettow, *supra* note 28, at 524.

<sup>66</sup> *See, e.g.*, *Young v. Black*, 11 U.S. (7 Cranch) 565, 568 (1813); *Copeland v. New England Ins. Co.*, 39 Mass. (22 Pick.) 135, 138–39, 142 (1839).

<sup>67</sup> *See, e.g.*, *Patteson v. Ford*, 43 Va. (2 Gratt.) 18, 28 (1845); MILLAR, *supra* note 2, at 301–02.

<sup>68</sup> *See* Kenneth A. Krasity, *The Role of the Judge in Jury Trials: The Elimination of Judicial Evaluation of Fact in American State Courts from 1795 to 1913*, 62 U. DET. L. REV. 595,

correcting jury error, American courts turned increasingly to new trial.

New trial, however, was a costly remedy, adding the delay and expense of another jury trial. As the numbers of complicated tort cases grew in the late nineteenth century, concerns about docket pressure increased.<sup>69</sup> In the late nineteenth century, courts and commentators complained about the inefficiency of new trial.<sup>70</sup> By the early twentieth century, such laments had become common. One of the best-known was Roscoe Pound's address to the American Bar Association in St. Paul in 1906, later published as *The Causes of Popular Dissatisfaction with the Administration of Justice*.<sup>71</sup> Pound called the "lavish" granting of new trials "the worst feature of American procedure," and claimed that over forty percent of reported state appellate decisions resulted in a new trial.<sup>72</sup>

A 1935 article in the *Michigan Law Review* gave three reasons why the remedy of new trial had proved "eminently unsatisfactory."<sup>73</sup> First, "it submits the aggrieved party to the delay, annoyance, and cost of a re-litigation which will undoubtedly end in his favor anyway if the memories of his witnesses have not become dulled by the passage of time."<sup>74</sup> Second, the practice offers "a temptation to an unscrupulous party, defeated on the appeal, to manufacture evidence to conform with an appellate court's opinion."<sup>75</sup> Third, "it clogs further already overburdened court dockets."<sup>76</sup>

### C. *Modification of New Trial Procedure in the United States and England: The Partial New Trial*

Some state courts developed innovations in new trial procedure to try to limit delay and expense. In Massachusetts, for example, courts since at least the 1830s used a procedure that could be called

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595–96 (1985); Renée L. Lerner, *The Transformation of the American Civil Trial: The Silent Judge*, 42 WM. & MARY L. REV. 195, 197–99 (2000).

<sup>69</sup> JOHN H. LANGBEIN, RENÉE L. LERNER & BRUCE P. SMITH, *HISTORY OF THE COMMON LAW: THE DEVELOPMENT OF ANGLO-AMERICAN LEGAL INSTITUTIONS* 755–57 (2009).

<sup>70</sup> See, e.g., *Pleasants v. Fant*, 89 U.S. (22 Wall.) 116, 122 (1874); *Meyer v. Houck*, 52 N.W. 235, 237 (Iowa 1892).

<sup>71</sup> Roscoe Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, 20 J. AM. JUDICATURE SOC'Y 178 (1937) (reprinting Pound's 1906 address to the American Bar Association).

<sup>72</sup> *Id.* at 185.

<sup>73</sup> *Pierce*, *supra* note 36, at 93.

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

the partial new trial. Unlike in England at the time, a court in that state could limit a new trial to a particular issue of fact, for example, assessment of damages.<sup>77</sup> This procedure prevented trying the entire case over again. A number of other state courts later approved this limitation of new trial to a particular issue in an appropriate case.<sup>78</sup> A few state courts, however, refused to allow a partial new trial and required the entire case to be tried again.<sup>79</sup> Even courts which did allow the procedure warned on occasion that it should be exercised “with caution,” because it was often difficult to separate issues in a case, to be sure that a jury’s determination of one issue would not affect another.<sup>80</sup>

The inefficiencies of the remedy of new trial were recognized in England as well, and in the late nineteenth century, Parliament and the English courts also limited retrials. The Judicature Acts (Appellate Jurisdiction Act of 1876) authorized English courts to grant partial new trials.<sup>81</sup> In addition, the Act of 1876 provided that courts were not to grant new trials for misdirection of the trial judge or for improper admission or rejection of evidence unless “some substantial wrong or miscarriage has been thereby occasioned.”<sup>82</sup> A leading com-

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<sup>77</sup> See, e.g., *Simmons v. Fish*, 97 N.E. 102, 103 (Mass. 1912) (“The practice has prevailed for many years in this court of awarding a new trial upon a single point where the error committed in the trial court was of a kind which could be readily separated from the general issues, and applied without injustice to one matter.”); *In re Opinion of the Justices*, 94 N.E. 846, 848 (Mass. 1911) (stating that a proposed statute allowing courts to limit new trial to the question of damages alone “is in accordance with the general practice to grant a new trial upon the question of damages only, if the verdict is satisfactory in all particulars as a determination of the liability”); *Winn v. Columbian Ins. Co.*, 29 Mass. (12 Pick.) 279, 293 (1831) (ordering a new trial for the purposes of assessing damages only).

<sup>78</sup> See, e.g., *Walker v. Blassingame*, 17 Ala. 810, 813–14 (1850); *Woodward v. Horst*, 10 Iowa 120, 123 (1859); *Simmons*, 97 N.E. at 105 n.1 (citing cases from other states); *Lisbon v. Lyman*, 49 N.H. 553, 582–605 (1870); *Laney v. Bradford*, 38 S.C.L. (4 Rich.) 1, 3 (1850). In the early twentieth century, as docket pressure grew, the number of states allowing partial new trial either by judicial decision or by statute grew significantly. See MILLAR, *supra* note 2, at 342–43.

<sup>79</sup> See, e.g., *Johnson v. McCulloch*, 89 Ind. 270 (1883).

<sup>80</sup> *Bothwell v. Bos. Elevated Ry. Co.*, 102 N.E. 665, 668 (Mass. 1913).

<sup>81</sup> M.D. CHALMERS, *WILSON’S SUPREME COURT OF JUDICATURE ACTS, APPELLATE JURISDICTION ACT, 1876, RULES OF COURT AND FORMS* 353 (3d ed. 1882) (Order XXXIX, Rules 3 & 4).

<sup>82</sup> *Id.* (Order XXXIX, Rule 3). The full text of the rules reads:

3. A new trial shall not be granted on the ground of misdirection or of the improper admission or rejection of evidence, unless in the opinion of the Court to which the application is made some substantial wrong or miscarriage has been thereby occasioned in the trial of the action; and if it appear to such Court that such wrong or miscarriage affects part only of the matter in controversy, the Court may give final judgment as to part thereof, and direct a new trial as to the other part only. . . .

4. A new trial may be ordered on any question in an action, whatever be the

mentary on the Judicature Acts<sup>83</sup> stated that these rules made significant changes. Formerly, a misdirection of the judge or the improper admission or rejection of evidence was grounds for a new trial as of right, and the courts only had power to grant a new trial of the entire action.<sup>84</sup>

In addition to their powers to limit retrial under the Judicature Acts, English judges developed practices that furthered this goal. In a case in 1893, the judges of the Divisional Court showed a flexible attitude to new trial.<sup>85</sup> Although they thought that the judge below should have left a question to the jury rather than deciding it himself, because the parties wanted the matter decided without retrial and because the judge had reached the right conclusion, they did not order a new trial.<sup>86</sup> One of the judges commented:

There is a rule, which is adopted on motions for a new trial and upon which we are going to act, that, when the cause has been tried and the judges feel that they have all the facts before them so that they are enabled to give a judgment that will finally settle the matters in difference between the parties, they are entitled to give such a judgment, although the practice involves, I will not say usurpation by the judges, but a partial transfer to them of the functions of the jury.<sup>87</sup>

Some American courts adopted a similar harmless error rule if a judge erroneously took a case from a jury.<sup>88</sup>

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grounds for the new trial, without interfering with the finding or decision upon any other question.

*Id.*

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> *Pearce v. Lansdowne*, [1893] 62 Q.B. 441 (Eng.) (Williams, J.).

<sup>86</sup> *Id.* at 443; see THAYER, *supra* note 50, at 239–41.

<sup>87</sup> *Pearce v. Lansdowne*, [1893] 69 L.T. 316, 318 (Q.B.) (Williams, J.).

<sup>88</sup> See, e.g., *In re Sharon's Estate*, 177 P. 283, 290 (Cal. 1918) (en banc) (holding that unless an erroneous decision to direct a verdict has caused a “miscarriage of justice,” “the error must be disregarded and the judgment cannot be set aside on account thereof”); see also *Catlett v. St. Louis, Iron Mountain & S. Ry. Co.*, 21 S.W. 1062, 1063 (Ark. 1893) (“When a judgment is reversed in this court because of no evidence to sustain the verdict, and the cause appears to have been fully developed, it has grown to be the practice since the act of April 14, 1891, to dismiss the suit instead of remanding the cause for a new trial. It is the duty of the courts to prevent parties from being harassed by suit after it appears that the suit can be of no profit to the plaintiff.”).

## II. DIRECTED VERDICT IN THE FIRST HALF OF THE NINETEENTH CENTURY

American courts in the nineteenth century looked for ways to avoid the problems of new trial, and a method they often turned to was directed verdict (also known as “peremptory instruction”). In the first half of the nineteenth century, the procedure of directed verdict was closely entwined with nonsuit and comment on the evidence. Directed verdict was an outgrowth of these powers.

Courts held that the power to direct a verdict was a necessary result of the common law rule that the facts were for the jury, the law for the judge.<sup>89</sup> If a party had not made out a legally sufficient case, the other party should prevail as a matter of law. The line between fact and law, however, was highly malleable, and the trend through the nineteenth century was to turn questions that had been considered issues of fact for the jury into issues of law for the judge.<sup>90</sup> For instance, the question of sufficiency of the evidence became a question of law for the judge to decide.<sup>91</sup>

Different jurisdictions took somewhat different paths toward peremptory instructions. Many states followed an English model of directing a verdict, based on the courts’ powers to instruct on the law and comment on evidence. Some states that restricted comment on the evidence and did not allow compulsory nonsuit developed a different procedure, known as the instruction “as in case of a nonsuit.”

### A. *The English Model: An Outgrowth of the Power to Instruct on the Law and Comment on Evidence*

Although jury control strengthened greatly in the second half of the nineteenth century, it was far from absent in the early years of the United States. In the late eighteenth and early nineteenth centuries, the federal courts and courts in many states adopted procedures similar to English courts, in which a judge would “direct a verdict” for plaintiff or defendant as an outgrowth of the judge’s power to instruct on the law and comment on the evidence. Examples of judges “directing a verdict” in this way exist in some of the earliest printed reports for American states,<sup>92</sup> and the practice undoubtedly existed before.

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<sup>89</sup> See, e.g., *People v. Cook*, 8 N.Y. 67, 67–68 (1853).

<sup>90</sup> LANGBEIN, LERNER & SMITH, *supra* note 69, at 448–50.

<sup>91</sup> Lettow, *supra* note 28, at 542–47.

<sup>92</sup> See, e.g., *Polk’s Lessee v. Minner*, 1 Del. Cas. 59, 61 (1795); *Danforth v. Sargeant*, 14

For example, in a 1780 case before the Supreme Judicial Court of Massachusetts, the defendants had rented the plaintiff's premises for a year, and stayed beyond the term of the lease.<sup>93</sup> The plaintiff warned the defendants to get out, but the defendants insisted they had a right to stay until ejected by law.<sup>94</sup> The plaintiff sued defendants for trespass.<sup>95</sup> The court held the defense to be "frivolous," and "directed a verdict for the plaintiff."<sup>96</sup>

In this procedure, a trial court actually instructed the jury to bring in a particular verdict, and then submitted the case to them.<sup>97</sup> Often, a judge would put the direction in the form of a condition, such as "if the evidence is believed by the jury to be true, the plaintiff is not entitled to recover."<sup>98</sup> The jury then was supposed to bring in the verdict as directed.<sup>99</sup> The clerk recorded this verdict, and the court then entered judgment accordingly. This procedure therefore retained the form of a jury verdict, although the decision was in substance the judge's.<sup>100</sup> Keeping the form of a jury verdict was important to assuage concerns about judicial power.

In the first half of the nineteenth century, if the jury gave a verdict against the judge's direction, the remedy was a new trial.<sup>101</sup> This was the same as the practice in England.<sup>102</sup> Cases in which a jury found against a judge's peremptory instruction seem to have been extremely rare.<sup>103</sup> In the late nineteenth century, the remedy for a recal-

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Mass. 491, 491 (1780); *Dennis v. Farr*, 3 N.C. (2 Hayw.) 245, 245 (1803); *Baughman v. Divler*, 3 Yeates 9, 10 (Pa. 1800).

<sup>93</sup> *Danforth*, 14 Mass. at 491.

<sup>94</sup> *Id.*

<sup>95</sup> *See id.*

<sup>96</sup> *Id.*

<sup>97</sup> *See, e.g., Parks v. Ross*, 52 U.S. (11 How.) 362, 366 (1850).

<sup>98</sup> *See, e.g., id.* at 372–73.

<sup>99</sup> *See, e.g., id.* at 371–72.

<sup>100</sup> Because the result of the directed verdict was formally a jury verdict throughout the nineteenth century, it can be difficult or impossible to determine from the minutes of courts or docket books whether a directed verdict occurred in a case. These records typically indicate "jury verdict for plaintiff, \$500 damages," or "jury verdict for defendant," without indicating whether the court directed a verdict. The only way to determine whether a directed verdict occurred would be to examine an individual case file in which there had been a jury verdict. *See, e.g., Law Docket Books of the Supreme Court of the District of Columbia (1863–1938)*, National Archives and Records Administration, Wash., D.C., RG 21, Entry 51; *Minutes of the General Terms of the Supreme Court of the District of Columbia (1863–1938)*, National Archives and Records Administration, Wash., D.C., RG 21, Entry 53.

<sup>101</sup> *See Polk's Lessee v. Minner*, 1 Del. Cas. 59, 61 (1795).

<sup>102</sup> *See supra* notes 60–64 and accompanying text.

<sup>103</sup> A Delaware case in 1795 is the only case I have seen in the first half of the nineteenth

citrant jury began to change, and a new trial was no longer required. This development is discussed in Part III.D.3.

Trial judges regularly directed verdicts if they were uncertain about the applicable law. In this circumstance, a trial judge would make the verdict subject to the full court's opinion on the law.<sup>104</sup> This practice was almost identical to the English case reserved.<sup>105</sup>

*B. Directed Verdicts for Plaintiffs and for Defendants: The Growing Importance of Clarity and Finality in Commercial Cases*

The vast majority of the directed verdicts before the 1810s were in favor of the plaintiff.<sup>106</sup> It was usually not necessary to direct a verdict for the defendant because the plaintiff would agree to a nonsuit (or, in some states, could be nonsuited without his consent).<sup>107</sup> Ordinarily, a nonsuit was not a final judgment on the merits and left the plaintiff free to bring another action.<sup>108</sup> Because of this lack of finality, in a number of states, plaintiffs could not appeal a nonsuit in many circumstances.<sup>109</sup>

In the late 1810s, the number of reported directed verdicts in favor of the defendant began to grow.<sup>110</sup> This change may have occurred because trial courts wanted to encourage finality by giving defendants a verdict, rather than subjecting them to further possible litigation after a nonsuit. Also, the switch to directed verdict for defendant from nonsuit allowed more plaintiffs to appeal, and therefore better enabled courts to clarify the law, and to provide predictability. Finality and clarity of law were particularly important to courts in commercial cases in the early nineteenth century.<sup>111</sup>

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century in which a jury refused to follow a judge's peremptory instruction. *See Polk's Lessee*, 1 Del. Cas. at 61.

<sup>104</sup> *See, e.g., Weaver v. Bentley*, 1 Cai. 47, 47 (N.Y. Sup. Ct. 1803); *Kiddie v. Debrutz*, 2 N.C. (1 Hayw.) 420, 422 (1796).

<sup>105</sup> *See supra* Part I.A.

<sup>106</sup> *See, e.g., Polk's Lessee*, 1 Del. Cas. at 61; *Danforth v. Sargeant*, 14 Mass. 491, 491 (1780); *Dennis v. Farr*, 3 N.C. (2 Hayw.) 245, 245 (1803); *Baughman v. Divler*, 3 Yeates 9, 10 (Pa. 1800).

<sup>107</sup> MILLAR, *supra* note 2, at 303.

<sup>108</sup> *Id.* at 305.

<sup>109</sup> *See, e.g., Union Bank v. Carr*, 21 Tenn. (2 Hum.) 345, 346 (1841). This rule was mitigated, however, by allowing a nonsuited plaintiff to appeal if costs were awarded against him. Also, often a plaintiff who had been nonsuited involuntarily could appeal.

<sup>110</sup> *See, e.g., King v. President of Dedham Bank*, 15 Mass. (1 Tyng) 447, 453 (1819); *Skinner v. Skinner*, 7 N.C. (3 Mur.) 535, 536–38 (1819); *Catlin v. Chittenden & Co.*, Brayt. 163, 164 (Vt. 1819).

<sup>111</sup> *See LANGBEIN, LERNER & SMITH, supra* note 69, at 499; Lettow, *supra* note 28, at 546. The desire for clarity of law, particularly in commercial cases, also helped prompt the switch in

Not only did directed verdicts further finality and help clarify the law, but they also made the results of adjudication more predictable in commercial cases by avoiding unfettered jury decisions. Juror biases could unsettle application of the law, particularly in insurance and banking cases. Juries in the early nineteenth century were apt to find against defendant insurance companies or banks which had denied payment on claims, regardless of the law or evidence.<sup>112</sup> The growing commercial activity of the new republic seems to have encouraged the practice of directed verdict for the defendant.

For example, in a case in 1819 before the Supreme Judicial Court of Massachusetts, plaintiff, as the bearer of a bill, claimed the right to demand payment directly from the defendants, officers of a recently incorporated bank, without first demanding payment from anyone else.<sup>113</sup> The bill, however, was a draft on a third person, with an implied promise that the defendants would pay in case of default.<sup>114</sup> The full court approved the trial court's direction of a verdict for the defendants.<sup>115</sup> The court was eager to correct "[t]he mistake of the plaintiff, and perhaps of others who received bills of this description, [which] seems to have arisen from the belief that, when a bank was incorporated, all their bills and notes, of whatever tenor, were to pass as money, and were redeemable by the bank at the pleasure of the holder."<sup>116</sup> Many more banks were being incorporated in the late 1810s,<sup>117</sup> and this kind of clarity was important to foster growing commercial activity. The court may have felt particular urgency in clarifying the law because of the financial panic of 1819.<sup>118</sup>

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New England states in the early nineteenth century from a panel of judges presiding at trial to a single judge. A single judge could give clearer and more authoritative instructions to the jury than a panel. This switch is evident between a 1780 Massachusetts case, in which a panel presided over the trial (and all of them approved the directed verdict), and an 1819 case, in which a single judge presided at trial and the full court reviewed the trial judge's actions. *Compare Danforth*, 14 Mass. at 491, *with King*, 15 Mass. (1 Tyng) at 447.

<sup>112</sup> Lettow, *supra* note 28, at 546.

<sup>113</sup> *King*, 15 Mass. (1 Tyng) at 453.

<sup>114</sup> *Id.*

<sup>115</sup> *Id.*

<sup>116</sup> *Id.*

<sup>117</sup> J. VAN FENSTERMAKER, *THE DEVELOPMENT OF AMERICAN COMMERCIAL BANKING: 1782-1837*, at 183 (1965); J. Van Fenstermaker, *The Statistics of American Commercial Banking, 1782-1818*, 25 J. ECON. HIST. 400, 400-01 (1965). This great expansion of banks, and money supply, led to the Panic of 1819. MURRAY N. ROTHBARD, *THE PANIC OF 1819: REACTIONS AND POLICIES* 6-10 (1962).

<sup>118</sup> See ROTHBARD, *supra* note 117, at 6-10.

### C. *Directed Verdict vs. Judicial Comment on Evidence*

In the early period, it could be difficult to distinguish the practice of judicial comment on evidence from a directed verdict. Courts, however, generally made a distinction between a strong comment, or a suggestion to a jury in favor of a party, and what they called a directed verdict or peremptory instruction.<sup>119</sup> In 1828, the U.S. Supreme Court considered the propriety of a trial judge's charge that the plaintiffs were not entitled to recover, and that the jury's verdict "ought to be for the defendants."<sup>120</sup> In his opinion for the Court, Justice Story rejected counsel's suggestion that the instruction was advisory to the jury, part of the judge's power to comment on evidence.<sup>121</sup> Story declared: "We do not, however, understand that the present instruction was in fact, or was intended to be, merely in the nature of advice to the jury. It is couched in the most absolute terms, and imposed an obligation upon the jury to find a verdict for the defendants."<sup>122</sup> The Court proceeded to hold that the trial court erred in not leaving certain questions to the jury, as the questions turned on disputed issues of fact.<sup>123</sup>

Comment on the evidence could be difficult for appellate judges to limit, as it could be so various in content and effect, but a decision to direct a verdict was more definite and could be reviewed more easily. Stephen Yeazell has pointed to both new trial and directed verdict as important devices for appellate courts to gain control of results at trial.<sup>124</sup> The trial courts applied the procedures, but appellate courts carefully monitored the application.<sup>125</sup>

### D. *The Standard for Directing a Verdict: The Scintilla Rule*

In order to direct a verdict, nearly all courts in the first half of the nineteenth century held that the evidence had to be uncontradicted. Even the slightest evidence on the other side would not permit a di-

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<sup>119</sup> See, e.g., *Loehner v. Home Mut. Ins. Co.*, 19 Mo. 628, 631 (1854). New York courts, however, sometimes did not clearly distinguish between a directed verdict or a peremptory instruction and advice to the jury. See, e.g., *People v. Cook*, 8 N.Y. 67, 76 (1853).

<sup>120</sup> *McLanahan v. Universal Ins. Co.*, 26 U.S. (1 Pet.) 170, 182 (1828).

<sup>121</sup> *Id.*

<sup>122</sup> *Id.*

<sup>123</sup> *Id.* at 191.

<sup>124</sup> Stephen C. Yeazell, *The Misunderstood Consequences of Modern Civil Process*, 1994 WIS. L. REV. 631, 644.

<sup>125</sup> *Id.* ("The capture of trials by appellate courts gave them almost plenary power, not just over the law applied by trial courts, but over the results reached in individual cases."); see also LEON GREEN, *JUDGE AND JURY* 380 (1930).

rected verdict.<sup>126</sup> In the second half of the nineteenth century, this standard became known, rather disparagingly, as the “scintilla rule.”<sup>127</sup> Many state courts agreed with the rule in federal courts that giving a peremptory instruction required the same standard as a demurrer. In *Parks v. Ross*,<sup>128</sup> in 1850, the U.S. Supreme Court approved of the trial court’s “imperative” instruction to the jury to find for the defendant because the case met the standard of a demurrer to evidence.<sup>129</sup> “It answers the same purpose, and should be tested by the same rules.”<sup>130</sup> (Directed verdict replaced demurrer because a motion for directed verdict, unlike a demurrer, allowed the moving party to introduce evidence and generally to continue to litigate if the motion was defeated.) The Court explained: “A demurrer to evidence admits not only the facts stated therein, but also every conclusion which a jury might fairly or reasonably infer therefrom.”<sup>131</sup> A notable exception to this strict standard for the use of directed verdict in the first half of the nineteenth century was New York, discussed in Part III.A.2.

*E. Frequency of Directed Verdict: The Role of Commercial Development, Judicial Power, and the Field Code*

The number of reported cases involving directed verdict in many states grew steadily in the first few decades of the new nation, and more rapidly beginning in the late 1820s. Compared with other states, three states produced very large numbers of reported directed verdict cases: New York, Pennsylvania, and Massachusetts.<sup>132</sup> Not coinciden-

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<sup>126</sup> See, e.g., *Greenleaf v. Birth*, 34 U.S. (9 Pet.) 292, 299 (1835) (“Where there is no evidence tending to prove a particular fact, the court [sic] are bound so to instruct the jury, when requested.”).

<sup>127</sup> See, e.g., *Improvement Co. v. Munson*, 81 U.S. (14 Wall.) 442, 448 (1871); *Toomey v. London, Brighton & S. Coast Ry. Co.*, (1857) 140 Eng. Rep. 694 (C.P.) 696.

<sup>128</sup> *Parks v. Ross*, 52 U.S. (11 How.) 362 (1850).

<sup>129</sup> *Id.* at 372–73 (describing the trial court’s instruction to the jury at the close of plaintiff’s evidence as “that, if the evidence is believed by the jury to be true, the plaintiff is not entitled to recover.”).

<sup>130</sup> *Id.* at 373.

<sup>131</sup> *Id.*

<sup>132</sup> Nearly all of the New England states produced substantial numbers of directed verdict cases. The New England states were highly commercial compared with other regions and their judges had strong powers to comment on evidence. Lerner, *supra* note 68, at 253. Massachusetts courts seem almost entirely to have ignored an 1808 statute providing that civil juries were to “decide at their discretion, by a general verdict, both the fact and the law, involved in the issue.” MASS. GEN. LAWS ch. 139, § 15 (1808). Edith Henderson discusses the possible origin of this statute. See Henderson, *supra* note 2, at 304.

tally, these states all contained major commercial centers, and their judges retained strong powers to comment on evidence.<sup>133</sup>

In directing so many verdicts, New York judges serenely disregarded the apparent intent of the Field Code, the landmark codification of civil procedure drafted by a commission headed by David Dudley Field and enacted by the New York legislature in 1848.<sup>134</sup> The Field Code was hostile to judicial control of jury verdicts.<sup>135</sup> One scholar has remarked: “The commissioners spoke of the jury as one of ‘[o]ur most valued institutions’ and seemed to mean it.”<sup>136</sup> The Field Code did not provide for directed verdict,<sup>137</sup> thus suggesting that judges lacked the power to use the procedure. (The legislature, however, amended the New York Code in 1852 to give judges limited power to enter judgment notwithstanding the verdict,<sup>138</sup> a provision that was the first or among the first of its kind.)

The Field Code’s lack of a provision on directed verdict seems not to have dimmed in the slightest New York judges’ enthusiasm for the procedure. New York courts completely ignored the Field Code in their discussions of directed verdicts. In an 1853 case, the New York Court of Appeals laid out a comprehensive catalogue of a trial judge’s powers to take a civil case from a jury (including demurrer, nonsuit, and directed verdict), together with the appropriate standards for the procedures.<sup>139</sup> In this extended discussion, the court did not once mention the new Code, except as it authorized a convention of judges to decide on the number of counsel permitted to be heard.<sup>140</sup> The court declared: “Verdicts to an immense amount are daily taken, under the direction of the presiding judge, in cases where the defence

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<sup>133</sup> Lerner, *supra* note 68, at 253. In what was said to be a piece of legislative subterfuge, representative Benjamin Butler seems to have slipped into a bill about another subject a restriction on Massachusetts judges commenting on evidence; the bill passed the Massachusetts legislature in 1854. *Id.* at 256–57. The traditions of judicial control in Massachusetts were so strong, however, that it is doubtful how much effect the restriction had.

<sup>134</sup> FRIEDMAN, *supra* note 15, at 391.

<sup>135</sup> For example, the Field Code provided that the jury rather than the judge was to decide whether it would give a general or special verdict. 1848 N.Y. Laws 537, §§ 215–216.

<sup>136</sup> Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909, 937 (1987) (quoting THE FIRST REPORT OF THE (NEW YORK) COMMISSIONERS ON PRACTICE AND PLEADING 139 (1848)).

<sup>137</sup> See 1848 N.Y. Laws 537–38.

<sup>138</sup> See Robert Wyness Millar, *The Old Régime and the New in Civil Procedure*, 14 N.Y.U. L.Q. REV. 197, 210–11 (1936–1937); Young B. Smith, *The Power of the Judge to Direct a Verdict: Section 457-a of The New York Civil Practice Act*, 24 COLUM. L. REV. 111, 121–22 (1924).

<sup>139</sup> *People v. Cook*, 8 N.Y. 67, 70 (1853) (civil case, “in the nature of a *quo warranto*”).

<sup>140</sup> *Id.* at 76.

[sic.] has wholly failed.”<sup>141</sup> Many of these were actions to collect a debt. The New York Reports also contain significant numbers of directed verdicts for defendants, even with that state’s powerful compulsory nonsuit procedure.<sup>142</sup> Thus, in states with a strong judicial culture of jury control, even comprehensive codes failed to have an effect, at least without an outright prohibition of a procedure. This illustration suggests some of the limitations of codification generally; legal culture plays a large role in shaping procedure, regardless of the positive law.

In contrast with New York, states that greatly restricted judicial comment on the evidence and that had less sophisticated commercial activity tended to produce far fewer reported cases of directed verdicts. The procedure appeared to be much less common in those states. Tennessee, for example, had early restricted judicial comment on the evidence.<sup>143</sup> Although Tennessee’s Supreme Court of Errors and Appeals approved the practice of directed verdict in 1831, at least in theory,<sup>144</sup> the procedure seems to have been very rarely used there.<sup>145</sup> (A Tennessee court in 1852 did direct a verdict in favor of a defendant who appeared to have been joined for the sole purpose of preventing his testimony against the plaintiff, because of the rule of party disqualification for interest.<sup>146</sup> Directing the verdict allowed that defendant to testify as a witness for the other defendants.) Beginning in the late 1870s, Tennessee courts addressed the question of directed verdict more often in reported cases, as railroads, which were defendants in increasing numbers of cases, often requested directed verdicts.<sup>147</sup> In 1896, the Tennessee Supreme Court declared that directed verdict was not part of the state’s practice.<sup>148</sup>

#### F. *Instructing the Jury “As in Case of a Nonsuit”*

A procedure similar to the directed verdict began in Kentucky and spread to a number of other states and the federal courts in those states: instructing the jury “as in case of a nonsuit.” Courts tended to

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<sup>141</sup> *Id.* at 75.

<sup>142</sup> Restricting by date, I performed the following search in Westlaw’s New York Cases (NY-CS) database: “direct! /s verdict.”

<sup>143</sup> See Lerner, *supra* note 68, at 246.

<sup>144</sup> *Houston’s Lessee v. Pillow & Thomas*, 9 Tenn. (1 Yer.) 481, 488 (1831).

<sup>145</sup> See, e.g., *Hopkins v. Nashville, Chattanooga & St. Louis Ry. Co.*, 34 S.W. 1029, 1038 (Tenn. 1896) (discussing the court’s observation that it had not noticed a widespread practice of directing verdicts in the state).

<sup>146</sup> *Beasley v. Bradley*, 32 Tenn. (2 Swan) 180, 182 (1852). For similar cases in other states, see Blume, *supra* note 2, at 566–67.

<sup>147</sup> See, e.g., *Robinson v. Louisville & Nashville R.R. Co.*, 70 Tenn. 594, 596–97 (1879).

<sup>148</sup> *Hopkins*, 34 S.W. at 1038.

adopt this procedure in states that restricted comment on evidence and that did not allow compulsory nonsuit.<sup>149</sup> Kentucky, like some other states and the federal courts, did not allow a compulsory nonsuit.<sup>150</sup> A plaintiff had to agree before a case could be dismissed for failure of proof, without going to a jury.<sup>151</sup> If a plaintiff did not agree, the case would go to a jury even though a judge had determined the proof was inadequate at law.<sup>152</sup> This problem was compounded because Kentucky judges, like judges in Virginia, from which many Kentuckians came, were reluctant to comment on the evidence.<sup>153</sup>

The solution Kentucky courts adopted was the instruction to the jury “as in case of a nonsuit.” In this procedure, the defendant moved for the instruction at the close of plaintiff’s evidence.<sup>154</sup> In the timing of the motion, the procedure resembled the nonsuit. (As described below, this timing later proved to be highly significant.) If the judge granted the motion, he told the jury that they must find a verdict for defendant.<sup>155</sup> Unlike a nonsuit, this was a final decision on the merits and subject to appeal. The standard for giving an instruction “as in case of a nonsuit” was the same as for a nonsuit: “[T]he Court must not only consider the evidence given [by the plaintiff] as true, but are bound to infer from it every fact which the jury might fairly and rationally have inferred.”<sup>156</sup>

A Kentucky case from 1811 provides an example of the procedure. In the pleadings, the plaintiff claimed that defendants accepted a bill to pay the plaintiff an amount stated at a particular time.<sup>157</sup> At trial, the plaintiff introduced evidence that the defendants refused to accept the bill as written, but agreed to pay the amount “as it was convenient.”<sup>158</sup> Defendants at the close of plaintiff’s evidence moved

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<sup>149</sup> States that both restricted judicial comment on evidence and adopted the procedure allowing the judge to instruct the jury in the case of a nonsuit include: Alabama, Ohio, Illinois, Arkansas, Mississippi. See Lerner, *supra* note 68, at 222; *infra* notes 163–68. States that did not allow compulsory nonsuits yet allowed the judge to instruct the jury in the case of a nonsuit include: Alabama and Arkansas. See Smith v. Seaton, Minor 75 (Ala. 1822); Ringo v. Field, 6 Ark. 43, 44 (1845).

<sup>150</sup> See, e.g., Elmore v. Grymes, 26 U.S. (1 Pet.) 469, 471–72 (1828); Reed v. Bragg, 28 Ky. (5 J.J. Marsh.) 620, 620 (1831).

<sup>151</sup> See Henderson, *supra* note 2, at 300.

<sup>152</sup> See *id.*

<sup>153</sup> See, e.g., Hurt v. Miller, 10 Ky. (3 A.K. Marsh.) 336, 337 (1821).

<sup>154</sup> See, e.g., Gray v. Craig, 5 Ky. (2 Bibb) 312, 313 (1811).

<sup>155</sup> See, e.g., *id.*

<sup>156</sup> Gallatin v. Bradford, 4 Ky. (1 Bibb) 209, 209 (1808) (explaining the standard for directing a jury as in case of a nonsuit in terms of the standard for nonsuit).

<sup>157</sup> Gray, 5 Ky. (2 Bibb) at 312.

<sup>158</sup> *Id.* at 313.

for an instruction to the jury “as in case of a nonsuit,” because there was “a fatal variance between the allegations and proofs.”<sup>159</sup> The trial court gave the instruction, the jury gave a verdict for the defendants, and the Kentucky Court of Appeals affirmed the instruction as being “clearly supported.”<sup>160</sup>

The first reference to this procedure occurs in some of the earliest Kentucky reports, in several cases in 1808, and is discussed there as if it is well-established.<sup>161</sup> Thereafter the Kentucky reports contain an average of several cases a year concerning the procedure through the mid-1870s;<sup>162</sup> the procedure seems to have been popular with judges and defendants up to that time.

Courts in several other states and an occasional federal court followed Kentucky in instructing “as in case of a nonsuit.” The first mention in the reports of the procedure outside Kentucky occurred in Alabama in 1821; the procedure appears in that case to be well-established.<sup>163</sup> Other states followed in the mid-1820s, with each having such cases in its first published reports: Mississippi (1824),<sup>164</sup> Ohio (1824),<sup>165</sup> and Illinois (1825).<sup>166</sup> The federal circuit court of Ohio took up the practice, and the U.S. Supreme Court duly reviewed its decision applying the procedure without special remark in 1829.<sup>167</sup> The Supreme Court of Indiana explicitly rejected the procedure in 1833,<sup>168</sup>

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<sup>159</sup> *Id.*

<sup>160</sup> *Id.*

<sup>161</sup> See *Hume v. Arrasmith*, 4 Ky. (1 Bibb) 165, 166 (1808); see also *Gallatin*, 4 Ky. (1 Bibb) at 209; *Hubbard v. Prather*, 4 Ky. (1 Bibb) 178, 180–81 (1808). *Bibb's Reports* was compiled by Judge Bibb, who wrote the opinions in the first two of these cases.

<sup>162</sup> I performed the following search in Westlaw's Kentucky Cases (KY-CS) database: “‘as in’ /2 case /4 nonsuit.” That search yields 142 Kentucky cases, of which 116 were decided before 1875, 14 between 1875 and 1895, and 12 after 1895.

<sup>163</sup> *Cabiness v. Brown*, Minor 41, 41 (Ala. 1821).

<sup>164</sup> *McFarland v. Smith*, 1 Miss. (1 Walker) 172, 173–74 (1824).

<sup>165</sup> *Courcier v. Graham*, 1 Ohio 330, 345, 347 (1824).

<sup>166</sup> *Cornelius v. Wash*, 1 Ill. (Breese) 98, 100 (1825).

<sup>167</sup> *Bank of U.S. v. Carneal*, 27 U.S. (2 Pet.) 543, 551 (1829) (“The [defendant] having asked the court below to instruct the jury as in case of a non-suit; and the court having acceded to his request, that instruction can be maintained only upon the supposition that there was no contrariety of evidence as to the facts which ought to have been left to the jury; and consequently, every inference fairly deducible from the facts which afforded a presumption of due notice, ought to be made in favour of the plaintiffs.”) (holding that the court below erred in giving the instruction because there was conflicting evidence).

<sup>168</sup> *State v. Beem*, 3 Blackf. 222, 223 (Ind. 1833) (“We cannot pass by this part of the case, without noticing the extraordinary nature of the instructions to the jury asked for by the defendant. The Court was asked to instruct the jury as in case of a non-suit. There is no such verdict known to the law as that here referred to. The Court is authorized by statute in certain cases, to give a judgment as in case of a non-suit; but a jury can not, in any case, find a verdict to that effect. The Court must be always right in refusing to instruct the jury to find such a verdict.”).

but other courts allowed it: Arkansas (1840)<sup>169</sup> and the Wisconsin Territory (1843).<sup>170</sup>

The states that adopted the procedure of instructing the jury as in case of a nonsuit either had from the beginning or developed substantial restrictions or prohibitions on trial judges commenting on evidence to the jury. In 1841, the High Court of Errors and Appeals of Mississippi faced a challenge to the procedure as violating a statute prohibiting judicial comment on evidence. Chief Justice William Sharkey acknowledged the state's prohibition on judicial comment on evidence.<sup>171</sup> "But at the same time," he wrote, "it must be the prerogative of the court to determine whether the evidence conduces to prove the issue . . . ."<sup>172</sup> The question whether the evidence tended to prove the issue was a matter of law for the court.<sup>173</sup>

Instructing the jury as in case of a nonsuit proved successful for a time with courts and defendants in some states, possibly because it seemed merely an extension of the well-known procedure of nonsuit, not an invasion of the province of the jury or a disapproved comment on evidence, as directed verdict might have seemed. It had the advantage over the nonsuit of providing finality to the defendant, if successful. (It could not operate in favor of plaintiffs.) With the growth of personal injury litigation against railroads, however, the procedure fell out of favor. Part III.B. discusses its decline in the late nineteenth century and its replacement with directed verdict.

### III. CHANGES IN DIRECTED VERDICT PROCEDURE IN THE SECOND HALF OF THE NINETEENTH CENTURY

Many significant changes occurred in directed verdict procedure in the second half of the nineteenth century. The numbers of reported directed verdicts increased dramatically; in many of these cases, trial judges directed verdicts for defendant railroads. A difference contributing to the larger number of reported directed verdicts was a change in the standard in the federal courts and most states. As described in Part III.A.2, the first jurisdiction to adopt the new standard was New York in the late 1820s. Following the lead of English courts, federal and state courts abandoned the scintilla rule, and courts began to direct verdicts if a contrary verdict given by a jury would be set aside as

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<sup>169</sup> *Palmer v. Ashley*, 3 Ark. 75, 83 (1840).

<sup>170</sup> *Stevens v. Coon*, 1 Pin. 356, 357–59 (Wis. 1843).

<sup>171</sup> *Perry v. Clarke*, 6 Miss. (5 Howard) 495, 501 (1841).

<sup>172</sup> *Id.* at 499.

<sup>173</sup> *Id.*

against evidence. In England and in the federal courts, this change in the standard for directed verdict closely followed the abolition of disqualification of witnesses for interest. Growing distrust of juries in England and America, especially in cases involving railroads, encouraged this change in the standard for directing verdicts. Greater numbers of complicated personal injury cases increased docket pressure for many courts, and intensified the search for an efficient alternative to new trial.

Substantive tort doctrines such as contributory negligence and the fellow servant rule facilitated direction of verdicts. The growing unpopularity of railroads led to attacks on these doctrines and on directed verdict itself. At the end of the nineteenth century and into the early twentieth, courts were increasingly willing to dispense with a direction to a jury entirely. Any pretense that the jury was involved was eliminated, and judicial power was exercised openly.

It is important to keep in mind the political pressures on American judges during this period. After the 1850s, judges in most states were elected.<sup>174</sup> Appointed judges, such as the federal judges, could certainly have political biases and ongoing political pressure from the desire to maintain standing in a community and other reasons. Elected judges faced more intense pressure, because of the need to stand for reelection, from political parties, interests, and the bar.<sup>175</sup>

Railroads and the populist hostility they inspired, in particular, were potent sources of political pressure in the late nineteenth century. Railroads were known to buy the votes of state legislators in certain instances, and otherwise could exercise great control over state legislatures.<sup>176</sup> Anti-railroad populist movements also influenced legislatures.<sup>177</sup> Railroads, through the extensive networks of lawyers they

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<sup>174</sup> Caleb Nelson, *A Re-Evaluation of Scholarly Explanations for the Rise of the Elective Judiciary in Antebellum America*, 37 AM. J. LEGAL HIST. 190, 207–09 (1993).

<sup>175</sup> See, e.g., LANGBEIN, LERNER & SMITH, *supra* note 69, at 506–09; Renée L. Lerner, *From Popular Control to Independence: Reform of the Elected Judiciary in Boss Tweed's New York*, 15 GEO. MASON L. REV. 109, 118–19, 134–38 (2007); Jed H. Shugerman, *The Twist of Long Terms: Judicial Elections, Role Fidelity, and American Tort Law*, 98 GEO. L.J. 1349, 1366–67 (2010).

<sup>176</sup> See, e.g., JAMES W. ELY, JR., *RAILROADS AND AMERICAN LAW* 1–4, 10–13, 19–41 (2001); LANGBEIN, LERNER & SMITH, *supra* note 69, at 1063–64; GEORGE MARTIN, *CAUSES AND CONFLICTS: THE CENTENNIAL HISTORY OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, 1870–1970*, at 3–15 (1970); Charles F. Adams, Jr., *A Chapter of Erie and An Erie Raid*, in *HIGH FINANCE IN THE SIXTIES: CHAPTERS FROM THE EARLY HISTORY OF THE ERIE RAILWAY* 63–67, 70–72, 74 (Frederick C. Hicks ed., 1929).

<sup>177</sup> See ELY, JR., *supra* note 176, at 80–93; DAVID MONTGOMERY, *THE FALL OF THE HOUSE OF LABOR: THE WORKPLACE, THE STATE, AND AMERICAN LABOR ACTIVISM, 1865–1925*, at 345 (1987); ELIZABETH SANDERS, *ROOTS OF REFORM: FARMERS, WORKERS, AND THE AMERICAN*

employed in all parts of the country, had influence with the bar.<sup>178</sup> Beginning in the 1880s, a specialized plaintiffs' bar arose, dedicated to litigation against railroads and financed by contingency fees.<sup>179</sup> Judges in many locales depended on the support of influential politicians, some of whom were also members of the bar, for renomination and reelection.<sup>180</sup> These sorts of pressure could not but affect to some extent legal doctrine and particular rulings.

A. *Changes in the Standard for Nonsuit and Directed Verdict: The Influence of Railroads*

Over the course of the nineteenth century, many jurisdictions abandoned the scintilla rule and allowed a trial judge to direct a verdict if a contrary verdict would be set aside for insufficient evidence and new trial granted. By the beginning of the twentieth century, a large majority of courts had announced this standard.<sup>181</sup>

Critics argued that this standard was incorrect, at least theoretically. Setting aside a verdict for insufficient evidence and ordering a new trial allowed the issue to be decided by another jury, thus preserving jury power. A judge directing a verdict, however, resulted in final judgment entered for the moving party and removed any significant role for the jury.<sup>182</sup>

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STATE, 1877–1917, at 46–47 (1999); Melvin I. Urofsky, *State Courts and Protective Legislation During the Progressive Era: A Reevaluation*, 72 J. AM. HIST. 63, 84 (1985).

<sup>178</sup> LANGBEIN, LERNER & SMITH, *supra* note 69, at 1021–25. A railroad typically had retainer contracts with many lawyers that prohibited the lawyer from representing a client in any case against the railroad, and even in any case against any railroad. Railroads sometimes tried to use these retainer contracts to monopolize legal talent in a locale, not always successfully.

<sup>179</sup> *Id.* at 1024–25, 1054–56; WILLIAM G. THOMAS, *LAWYERING FOR THE RAILROAD: BUSINESS, LAW, AND POWER IN THE NEW SOUTH* 45 (1999).

<sup>180</sup> LANGBEIN, LERNER & SMITH, *supra* note 69, at 506; Lerner, *supra* note 175, at 134–38.

<sup>181</sup> One commentator claimed that this was the standard “[i]n almost every jurisdiction.” Note, *Limitations on Power of Court to Direct Verdict*, 16 HARV. L. REV. 515, 515 (1903). This claim seems to have been exaggerated, but the number of states adopting this standard was large. See 26 RULING CASE LAW 1068 (William M. McKinney & Burdet A. Rich eds., 1929); WIGMORE, *supra* note 2, at 296–99.

<sup>182</sup> See, e.g., *Thompson v. Thompson*, 56 Ky. (17 B. Mon.) 22, 29 (1856) (“If [a litigant’s] verdict be set aside, he will have another opportunity, upon another trial, or [sic] strengthening his case by additional testimony. Whereas, if he be cut off by a peremptory instruction to find against him there is an end of the case, and he will enjoy no further opportunity of strengthening his proof.”); *McDonald v. Metro. St. Ry. Co.*, 60 N.E. 282, 283 (N.Y. 1901) (“The result of setting aside a verdict and the result of directing one are widely different, and should not be controlled by the same conditions or circumstances. In one case there is a retrial; in the other the judgment is final.”); 9 WIGMORE, *supra* note 2, at 299; Note, *Directed Verdict Under the New York Civil Practice Act*, 22 COLUM. L. REV. 256, 258–59 (1922); Note, *supra* note 181, at 515.

### 1. *Abolition of Disqualification for Interest*

A change in the law of evidence in the mid-nineteenth century led to more conflicting testimony in trials, indeed made possible many negligence actions, and may have encouraged judges to abandon the scintilla standard for directed verdict.<sup>183</sup>

In the eighteenth century and into the nineteenth in English and American courts, witnesses who were deemed to be interested in the outcome of the litigation were disqualified from testifying.<sup>184</sup> The ostensible rationale was fear of perjury.<sup>185</sup> Disqualification for interest included the parties themselves. As John Langbein has observed, disqualification of the parties in a tort case typically prevented testimony from the victim and injurer, which was often indispensable to prove the case.<sup>186</sup> It is not surprising that while the rule of disqualification for interest prevailed, few negligence cases were brought, and the law of torts remained largely undeveloped.<sup>187</sup>

Beginning in the mid-nineteenth century, England and American jurisdictions abolished this crippling rule.<sup>188</sup> Parliament abolished disqualification of civil parties for interest in 1851,<sup>189</sup> a date that closely preceded English courts' rejection of the scintilla standard for nonsuit in the 1850s.<sup>190</sup> Michigan was the first state to allow all nonparty interested witnesses to testify, in 1846, and Connecticut was the first state to allow interested parties to testify, in 1848.<sup>191</sup> Northern states followed rapidly in the 1850s, Southern states after the Civil War, and by 1881, all states allowed parties to testify in civil cases.<sup>192</sup> Congress allowed civil parties in federal court to testify in 1864.<sup>193</sup> As explained below, the U.S. Supreme Court abandoned the scintilla rule for di-

<sup>183</sup> I am indebted to John Leubsdorf for suggesting this connection.

<sup>184</sup> John H. Langbein, *Historical Foundations of the Law of Evidence: A View From the Ryder Sources*, 96 COLUM. L. REV. 1168, 1174, 1179, 1184–86 (1996).

<sup>185</sup> See *id.* at 1184.

<sup>186</sup> *Id.* at 1179; see also NELSON, *supra* note 4, at 24–25, 156.

<sup>187</sup> WITT, *supra* note 22, at 56–57; Langbein, *supra* note 184, at 1179.

<sup>188</sup> For explanations of the abolition of disqualification for interest in civil cases, see Joel N. Bodansky, *The Abolition of the Party-Witness Disqualification: An Historical Survey*, 70 KY. L.J. 91, 94 (1981–1982); George Fisher, *The Jury's Rise As Lie Detector*, 107 YALE L.J. 575, 659–62, 669–74 (1997).

<sup>189</sup> An Act to Amend the Law of Evidence, 1851, 14 & 15 Vict., c. 99 (Eng.).

<sup>190</sup> See *infra* Part III.A.3.

<sup>191</sup> Bodansky, *supra* note 188, at 93; Fisher, *supra* note 188, at 659.

<sup>192</sup> Fisher, *supra* note 188, at 669.

<sup>193</sup> Act of July 2, 1864, ch. 210, § 3, 13 Stat. 344, 351 (1864) (“*Provided*, That in the courts of the United States there shall be no exclusion of any witness on account of color, nor in civil actions because he is a party to, or interested in, the issue tried.”) (attached to a provision appropriating money for detection and prosecution of counterfeiting).

rected verdict soon afterward, in 1871.<sup>194</sup> In nearly all jurisdictions, the abolition of disqualification for interest occurred by statute,<sup>195</sup> not by judicial decision.

The rule of disqualification for interest had prevented many negligence cases from going to a jury, or being brought at all. With the rule's abolition, more cases of negligence were brought, and many presented conflicting testimony. Deciding which witnesses to credit was traditionally a task for the jury.<sup>196</sup> This was one reason why the common law in the eighteenth century showed so great a preference for written evidence;<sup>197</sup> written evidence (such as a contract or a deed) permitted greater judicial decisionmaking.<sup>198</sup> Because of doubts about jury competence, the law of evidence—including disqualification for interest—had been used for jury avoidance.<sup>199</sup>

The abolition of disqualification for interest released a flood of oral testimony, and therefore, potentially, of jury decisionmaking. Doubts about the jury's competence and impartiality had not disappeared, however; indeed, they were growing.<sup>200</sup> In this new procedural world, English and many American judges were reluctant to sit by and let a jury credit witnesses whose testimony the judge thought was incredible, or draw an inference of negligence the judge thought was unjustified. The judges gave themselves more latitude to nonsuit or to give a binding instruction to a jury in cases of conflicting testimony, or weak evidence of negligence. In effect, the new standard for directed verdict substituted for the old disqualification for interest as a method of jury control or avoidance.<sup>201</sup> To be sure, old jury control devices were abolished, but new ones took their place. A great advantage of the new devices over the old, however, was that, by allowing party testimony, more injured parties could sue for negligence.

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<sup>194</sup> See *infra* Part III.A.5.

<sup>195</sup> Fisher, *supra* note 188, at 659.

<sup>196</sup> See, e.g., *supra* text accompanying notes 49–55 (discussing reluctance of English judges to sustain a demurrer to the evidence in cases involving oral testimony).

<sup>197</sup> Langbein, *supra* note 184, at 1185.

<sup>198</sup> See *supra* text accompanying notes 49–55.

<sup>199</sup> See Fisher, *supra* note 188, at 657–58.

<sup>200</sup> See *infra* Part III.A.3–4.

<sup>201</sup> This analysis qualifies George Fisher's statement that the nineteenth-century legal system "invested ever greater confidence in the jury's capacity to resolve factual disputes." Fisher, *supra* note 188, at 661. Fisher remarked on the continuing ambivalence of judges and lawyers toward juries, *id.* at 698–701, but did not discuss the new mechanisms of jury control, probably because of his emphasis on criminal cases.

## 2. *New York: Conflict Over Railroads*

Beginning in the late 1820s, New York courts held that a trial judge could take a case from a jury by nonsuit or peremptory instruction even if there was some contradictory evidence, as long as the court would have ordered a new trial for verdict against evidence if the jury had given the opposite verdict.<sup>202</sup> As the standard for ordering a new trial for verdict against evidence itself changed over time to permit judges increasingly to weigh contradictory evidence,<sup>203</sup> this rule allowed judges increasing power to take cases away from juries. New York at the time had a large amount of sophisticated commercial activity compared with other states, and was one of the first states to have an extensive network of railroads.<sup>204</sup>

New York courts justified taking cases from juries in part because of jury bias against railroads. In *Haring v. New York & Erie Railroad Co.*,<sup>205</sup> according to testimony for the plaintiff, plaintiff's deceased husband was driving a sleigh very fast on a highway across a railroad track at a place where high embankments made it impossible to see cars coming until one was on the tracks.<sup>206</sup> Railroad cars struck the

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<sup>202</sup> See, e.g., *Rich v. Rich*, 16 Wend. 663, 676 (N.Y. Sup. Ct. 1837) ("To warrant an unqualified direction at the trial in favor of one or the other party, the evidence must either be undisputed, or there must be such a strong preponderance that should the jury find against it, a new trial would be granted for that reason."); *Demyer v. Souzer*, 6 Wend. 436, 438 (N.Y. Sup. Ct. 1831) ("[W]here the evidence in favor of the plaintiff's right is so slight, and that which supports the defence so strong, that had the jury found for the plaintiff the court would have felt itself called on to set aside [sic] their verdict, it will not send the cause back to the jury because the judge ordered a nonsuit."); *Stuart v. Simpson*, 1 Wend. 376, 379 (N.Y. Sup. Ct. 1828) ("But it is said that slight circumstances are sufficient to go to the jury, and whether the defendant knew the boys to be the plaintiff's apprentices or not, was a question for the jury. I agree that courts should be extremely cautious, on the subject of interfering with the province of the jury; yet it is matter of common practice to set aside verdicts as against evidence, and sometimes because they are against the weight of evidence. If, therefore, the evidence would not authorize a jury to find a verdict for the plaintiff, or the court would set it aside if so found, as contrary to evidence, in such cases it is the duty of the court to nonsuit the plaintiff.") (upholding a nonsuit in a case in which the plaintiff sued defendant for enticing his apprentices to work for him; plaintiff had to prove defendant's knowledge that the boys were the apprentices of plaintiff, a carpenter; the evidence alleged by plaintiff was that the boys were young and appeared with mahogany dust on their clothes).

<sup>203</sup> See Lettow, *supra* note 28, at 542–46.

<sup>204</sup> See Wex S. Malone, *The Formative Era of Contributory Negligence*, 41 ILL. L. REV. 151, 152 (1946) ("[B]y 1850 Albany and Buffalo were connected, and another line, the Erie, was approaching Dunkirk on Lake Erie. Thus New York became a fountainhead of American railroad law.").

<sup>205</sup> *Haring v. N.Y. & Erie R.R. Co.*, 13 Barb. 9 (N.Y. Gen. Term 1852).

<sup>206</sup> *Id.* at 14–15. Plaintiff also introduced testimony that the railroad had failed to ring a bell in running the cars, as required by law. Conceding that the railroad might also have been negligent, the trial court remarked, "the plaintiff must show that the act of the defendants was

sleigh, throwing the driver out and causing injuries leading to his death.<sup>207</sup> At the close of plaintiff's evidence, the defendant railroad moved for a nonsuit on the ground of contributory negligence,<sup>208</sup> a rule by then well established in New York.<sup>209</sup> After considerable deliberation and arguments from counsel, the trial judge granted the motion and nonsuited the plaintiff.<sup>210</sup> The General Term of the Supreme Court of New York County (composed of trial judges sitting together as an appellate court) affirmed the nonsuit, holding that the deceased was undoubtedly negligent.<sup>211</sup> The court openly discussed jury biases in cases against railroads:

[J]uries ordinarily find according to the direction or intimation of the circuit judge, where there is a strong preponderance of testimony. But there are cases in which this conformity of opinion may not exist. We can not shut our eyes to the fact that in certain controversies between the weak and the strong—between a humble individual and a gigantic corporation, the sympathies of the human mind naturally, honestly and generously, run to the assistance and support of the feeble, and apparently oppressed; and that compassion will sometimes exercise over the deliberations of a jury, an influence which, however honorable to them as philanthropists, is wholly inconsistent with the principles of law and the ends of justice. There, is therefore, a manifest propriety in withdrawing from the consideration of the jury, those cases in which the plaintiff fails to show a right of recovery.<sup>212</sup>

New York trial judges feared that even their considerable powers to comment on evidence would not suffice to overcome jury bias in rail-

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the sole cause of his injury; that it would not have happened if such cause had not existed." *Id.* at 11.

<sup>207</sup> *Id.* at 9–10.

<sup>208</sup> *Id.*

<sup>209</sup> *See, e.g.,* Rathbun v. Payne, 19 Wend. 399, 400–01 (N.Y. Sup. Ct. 1838) (“[A] plaintiff suing for negligence must be wholly without fault.”) (denying recovery because of contributory negligence); Spencer v. Utica & Schenectady R.R. Co., 5 Barb. 337, 338–39 (N.Y. Gen. Term 1849) (“It was equally necessary for the plaintiff to establish the proposition that he himself was without negligence and without fault. This is a stern and unbending rule, which has been settled by a long series of adjudged cases, which we cannot overrule if we would.”) (holding that plaintiff was contributorily negligent). On the development of the contributory negligence rule in New York, see generally Malone, *supra* note 204.

<sup>210</sup> *Haring*, 13 Barb. at 10.

<sup>211</sup> *Id.* at 15 (“A man who rushes headlong against a locomotive engine, without using the ordinary means of discovering his danger, cannot be said to exercise ordinary care.”).

<sup>212</sup> *Id.* at 15–16.

road cases, and held that such cases should be taken from the jury entirely.<sup>213</sup>

Two different opinions of the New York Court of Appeals in the 1860s in the same case illustrate differing views about the respective role of judges and juries in cases against railroads. In *Ernst v. Hudson River Railroad Co.*,<sup>214</sup> plaintiff was the widow of a man who drove his sleigh on a highway across a railroad track when cars struck and killed him.<sup>215</sup> The railroad moved for a nonsuit on the ground of contributory negligence.<sup>216</sup> At least four trials occurred in the case.<sup>217</sup>

At the second trial, the jury brought in a verdict for the plaintiff. The Court of Appeals reversed in an opinion in 1862.<sup>218</sup> The plaintiff argued that a question of negligence was always a question of fact that should go to a jury.<sup>219</sup> The Court of Appeals, per Judge E. Darwin Smith, responded that questions of negligence should be subject to judicial control just as any other issue.<sup>220</sup> Judge Smith sharply contrasted the abilities of judges and jurors. The value of jury trial “chiefly depends upon the fact that the trials are had under the direction and supervision of educated and experienced judges, who have

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<sup>213</sup> See *id.*; see also *Mackey v. N.Y. Cent. R.R. Co.*, 27 Barb. 528, 540–41 (N.Y. Gen. Term 1858) (Smith, J.) (“[T]he justice at the trial would have been warranted in nonsuiting the plaintiffs; and how the jury could say that the plaintiffs’ intestate was not guilty of negligence, or that his negligence in no way contributed to his death, I cannot comprehend . . . [The jury verdict for plaintiffs was] directly *against the evidence*, and we cannot uphold it or refuse to set it aside, unless we adopt the rule which is, I fear, quite prevalent in the jury box, that the same measure of justice is not to be meted out to a rail road corporation that is meted out to natural persons.”).

Justice Seward Barculo, author of the opinion in *Haring*, stated that he as a trial judge put some limits on the rule that a plaintiff should be nonsuited if a contrary verdict would be set aside as against evidence. See *Haring*, 13 Barb. at 16 (“I am not, however, prepared to subscribe to the doctrine of nonsuiting, to the extent of applying it in *all cases*, where a verdict may be set aside, as against evidence. I find cases occasionally at the circuit, so complicated or so evenly balanced, that I feel bound to submit them to a jury; and after they have found a verdict, I feel equally bound, on a re-examination of the case, to set the verdict aside and submit it to a second jury. If the second jury find a similar verdict, I suffer it to stand. This I understand to be the correct practice. (*Fowler v. The Aetna Fire Ins. Co.* 7 Wend. 275. *Graham on New Trials.*) But the case before us is not of that character.”).

<sup>214</sup> *Ernst v. Hudson River R.R. Co.*, 35 N.Y. 9 (1866).

<sup>215</sup> *Id.* at 10.

<sup>216</sup> *Id.*

<sup>217</sup> See *id.* At the first trial, the trial judge nonsuited the plaintiff. On appeal to the General Term of the Supreme Court, the court granted a new trial because the evidence was not so clear that a verdict for the plaintiff would have been set aside as against evidence and a new trial ordered. *Ernst v. Hudson River R.R. Co.*, 32 Barb. 159, 161–64 (N.Y. Gen. Term 1860).

<sup>218</sup> *Ernst v. Hudson River R.R. Co.*, 24 How. Pr. 97 (N.Y. 1862).

<sup>219</sup> *Id.* at 104.

<sup>220</sup> *Id.* (“I deny that verdicts finding negligence are not just as much the subjects of review in the courts, as verdicts for any other causes of action.”).

devoted a lifetime to the study of law and to the practical administration of public justice.”<sup>221</sup> By contrast, jurors “are selected from the body of the people, for a single occasion, and, as a general rule, are unfamiliar with . . . the principles of law, and the processes of legal investigation.”<sup>222</sup> Although Judge Smith called trial by jury “a noble institution,”<sup>223</sup> his opinion made it sound anything but. The opinion is worth quoting at length because of its remarkable contrast between judge and jury.

[I]t is essential . . . that juries be carefully confined to their legitimate province, and that the rights and interests of society be not jeopardized by capricious verdicts, rendered and depending upon uncertain principles. It is of infinite consequence to the community that the law be kept and preserved as certain, clear, known and stable as possible. This can only be done by the courts, and this duty is specially confided to them, and required at their hands by the people.

This necessity makes it the duty of the courts to regulate the conduct of juries, to pass upon the evidence submitted to them, and to decide all questions of law arising during the progress of a trial; and to review their verdicts, and to set them aside, if unwarranted by the evidence.

The court is necessarily the ultimate judge in all cases upon the evidence, and must decide whether in conformity with the rules of law it will warrant or sustain a verdict.

The argument that it belongs to the jury to pass conclusively upon the evidence, is fundamentally unsound and untrue, and the argument that the opinion of twelve men in the jury-box is of higher authority upon a question of fact, and better evidence of the truth than the opinion of the judges, is more specious than sound . . . .

The decisions of courts and juries stand upon a very different footing.

Aside from the difference in capacity to decide correctly, arising from professional education and practice, and judicial experience, the judges act and decide deliberately, after patient and careful investigation, and give the reasons for their decisions, which are open to the careful scrutiny of the parties, and the vigilant criticism of an educated and enlightened bar, and of the public.

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<sup>221</sup> *Id.* at 105.

<sup>222</sup> *Id.*

<sup>223</sup> *Id.*

Juries will certainly act and decide more or less hastily, without time, in most instances, for much reflection, and also act and decide in secret; and from this consideration, and their large number, they certainly act under much less personal and individual responsibility than the judges; and besides, common observation and experience show that they are far more liable to be swayed by passion and excitement, and other undue influences. Their verdicts are therefore notoriously many times founded upon mistakes, misconceptions and other errors, which make it indispensable, to secure to this mode of trial the public confidence, that a power of supervision and review of the verdicts should exist in the courts, and should be exercised with fidelity and firmness.<sup>224</sup>

A third trial in the case revealed that much of the testimony which the railroad had previously produced to prove the deceased's negligence (including evidence that he was drunk, driving recklessly, and that he ignored four persons who told him to stop because a train was coming) was inaccurate and probably perjurious.<sup>225</sup> Nevertheless, the trial judge nonsuited the plaintiff.<sup>226</sup> In its second opinion in the case, in 1866, the Court of Appeals reversed the judgment and ordered a new trial.<sup>227</sup> At the end of his long opinion rehearsing the facts, Judge John Porter condemned "[t]he struggle of defendants . . . to induce the courts to resort to artificial refinements [of the law] for the protection of wrongdoers."<sup>228</sup> He also observed that "[t]here is an unfortunate and growing tendency to regard human life as of secondary importance, in comparison with the objects of commercial and corporate enterprise."<sup>229</sup> Judges encouraged this unfortunate tendency by taking doubtful cases from the jury and resolving them in favor of the defendant.<sup>230</sup> Contributory negligence was ordinarily a question of fact for the jury, "under appropriate instructions, and subject to the revisory power of the courts."<sup>231</sup> Any errors could be cor-

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<sup>224</sup> *Id.* at 105–07.

<sup>225</sup> *Ernst v. Hudson River R.R. Co.*, 35 N.Y. 9, 22 (1866).

<sup>226</sup> *Id.* at 20.

<sup>227</sup> *Id.* at 41.

<sup>228</sup> *Id.* at 40.

<sup>229</sup> *Id.*

<sup>230</sup> *Id.* at 40 ("Suits and appeals multiply, in the constantly increasing ratio of reckless injuries, which nothing could tend more to encourage than this theory of immunity from civil damages, on the assumption, as matter of law, that a party, over whom an engine is driven, is culpable for not keeping out of the way, and that the question, whether he was really guilty of negligence, is not one of fact for a jury.").

<sup>231</sup> *Id.* at 38.

rected by ordering a new trial.<sup>232</sup> (Later in the nineteenth century, as time-consuming personal injury cases multiplied, many courts were not as enthusiastic about the remedy of new trial.<sup>233</sup>) Judge Porter admitted: “Occasional instances occur, where the proof of misconduct is so clear and decisive, that the judges are bound to pass on the question of negligence, as matter of law.”<sup>234</sup> The concurring opinion by Judge Ward Hunt, also finding that a new trial should be held, showed less alarm.<sup>235</sup> Judge Hunt agreed that negligence, including contributory negligence, was ordinarily a question of fact for the jury, and commented that the evidence on contributory negligence in that case was sufficiently doubtful and conflicting that it should go to a jury.<sup>236</sup>

After a fourth trial in the case, a jury brought in another verdict for the plaintiff.<sup>237</sup> In a third decision in the case in 1868, the Court of Appeals affirmed the verdict.<sup>238</sup> The opinions of the judges were at pains to reconcile the two previous decisions of the court, and noted the different state of the evidence. The opinion of Judge Woodruff summed up the prevailing belief of the judges: “the case seems to me one in which, upon this question [of contributory negligence], honest, intelligent and impartial men may rationally differ,” and therefore the question should go to the jury, and a nonsuit not be ordered.<sup>239</sup> Many courts later used this standard in describing when a case should be taken from a jury.<sup>240</sup> Although there was a struggle over the proper role of the judge and jury in contributory negligence cases, New York courts generally agreed that a nonsuit or directed verdict was appro-

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<sup>232</sup> *Id.* at 40 (“If it be true, as is sometimes intimated, even from the bench, that false verdicts are occasionally rendered on questions like this, the remedy is to set them aside and not to usurp the prerogative of the jury.”).

<sup>233</sup> *See supra* notes 65–76 and accompanying text.

<sup>234</sup> *Ernst*, 35 N.Y. at 38.

<sup>235</sup> *Id.* at 48 (Hunt, J., concurring).

<sup>236</sup> *Id.* As a Justice on the U.S. Supreme Court a few years later, Hunt praised the wisdom of juries in deciding negligence cases brought against railroads. *Sioux City & Pac. R.R. Co. v. Stout*, 84 U.S. (17 Wall.) 657, 664 (1873) (“Twelve men of the average of the community, comprising men of education and men of little education, men of learning and men whose learning consists only in what they have themselves seen and heard, the merchant, the mechanic, the farmer, the laborer; these sit together, consult, apply their separate experience of the affairs of life to the facts proven, and draw a unanimous conclusion. This average judgment thus given it is the great effort of the law to obtain. It is assumed that twelve men know more of the common affairs of life than does one man, that they can draw wiser and safer conclusions from admitted facts thus occurring than can a single judge.”).

<sup>237</sup> *Ernst v. Hudson River R.R. Co.*, 39 N.Y. 61, 61 (1868).

<sup>238</sup> *Id.* at 66.

<sup>239</sup> *Id.* at 68 (Woodruff, J., concurring).

<sup>240</sup> *See, e.g., Nash v. N.Y. Cent. & H.R.R. Co.*, 1 N.Y.S. 269, 269–71 (N.Y. Gen. Term. 1888).

priate if a contrary verdict would be set aside as against the weight of the evidence.

Before the Civil War, no other American courts appear to have adopted this standard. A widely admired 1862 decision of the Massachusetts Supreme Judicial Court came close, holding that a trial court should direct a verdict “if the evidence is such that the court would set aside any number of contrary verdicts rendered upon it.”<sup>241</sup> Later in the nineteenth century, as explained below, the federal courts and many state courts adopted the standard for directed verdict first described in New York.

### 3. *Influential English Cases: Distrust of Juries*

For reasons very similar to New York courts, English courts moved away from the scintilla rule in the 1850s. The English cases influenced U.S. federal courts.<sup>242</sup> English and federal cases together were influential in the states.<sup>243</sup> In requiring a directed verdict or non-suit even when there was some evidence for the opposing party, the English courts were shifting the line between law and fact and demonstrating their increasing distrust of juries, particularly in cases involving railroads.

Despite their extensive power to comment on evidence and their considerable prestige, English judges in the 1850s, like New York judges, were concerned that juries might disregard their comments in certain kinds of cases. This concern was evident in *Toomey v. London, Brighton & South Coast Railway Co.*,<sup>244</sup> in the Court of Common Pleas.<sup>245</sup> The plaintiff, described as a “poor and illiterate person,” a hawker, was waiting on the platform of a railway station at night and needed to go to the men’s room.<sup>246</sup> He asked a stranger on the platform, not an employee of the railroad, where it was, and the stranger said to go to the right.<sup>247</sup> The plaintiff did, and found two doors.<sup>248</sup> One of them had a light over it, and had the words “For gentlemen” painted on it; the other had no light and was painted “Lamp-room.”<sup>249</sup> Plaintiff, in a hurry and unable to read, opened the

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<sup>241</sup> *Denny v. Williams*, 87 Mass. (5 Allen) 1, 5 (1862).

<sup>242</sup> See *infra* Part III.A.5.

<sup>243</sup> See *infra* Part III.A.6.

<sup>244</sup> *Toomey v. London, Brighton & S. Coast Ry. Co.*, (1857) 140 Eng. Rep. 694 (C.P.).

<sup>245</sup> *Id.* at 695.

<sup>246</sup> *Id.*

<sup>247</sup> *Id.*

<sup>248</sup> *Id.*

<sup>249</sup> *Id.*

wrong door, stepped forward, and fell down some steps.<sup>250</sup> He broke two ribs and was otherwise seriously hurt.<sup>251</sup> The plaintiff sued the railroad for negligence.<sup>252</sup> After evidence was presented, the trial judge agreed with the defendant that there was no evidence of the railroad's negligence to go to a jury, and nonsuited the plaintiff, subject to the full court's opinion.<sup>253</sup>

Before the full court, plaintiff's counsel argued that the lamp-room door should have been kept locked, and that because no legal rule could possibly define negligence in a personal injury case like this one, the question should be left to the jury.<sup>254</sup> The judges of the full court<sup>255</sup> held that there was no evidence of negligence by the railroad that should have gone to a jury. "A scintilla of evidence, or a mere surmise" that there may have been negligence would not justify the judge in leaving the case to the jury.<sup>256</sup> The result "possibly might" be different if there were evidence to show that the steps were more than ordinarily dangerous.<sup>257</sup> As it was, however, "[i]t is not enough to say that there was some evidence [of negligence]; for, every person who has had any experience in courts of justice knows very well that a case of this sort against a railway company could only be submitted to a jury with one result."<sup>258</sup>

A cluster of cases decided in the 1850s and 1860s shows similar concern with leaving issues to a jury, although the court's statement in *Toomey* is the most direct expression of the judges' fears about jurors' bias. In *Jewel v. Parr*,<sup>259</sup> the trial judge allowed to go to the jury questions about payment of a bill of exchange; the jury found for the defendant, but the full court held there was no defense evidence for a jury and that a verdict should be entered for plaintiff.

Applying the maxim *de minimus non curat lex*, when we say that there is no evidence to go to a jury, we do not mean that there is literally none, but that there is none which ought rea-

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<sup>250</sup> *Id.*

<sup>251</sup> *Id.*

<sup>252</sup> *Id.*

<sup>253</sup> *Id.*

<sup>254</sup> *Id.* at 696.

<sup>255</sup> Two of the four judges of the Court of Common Pleas did not take part in the discussion in *Toomey* because they were shareholders in the defendant, the railway. *Id.*

<sup>256</sup> *Id.* (Williams, J.) (Willes, J. agreeing).

<sup>257</sup> *Id.*

<sup>258</sup> *Id.*

<sup>259</sup> *Jewel v. Parr*, (1853) 138 Eng. Rep. 1460 (C.P.).

sonably to satisfy a jury that the fact sought to be proved is established.<sup>260</sup>

*Wheelton v. Hardisty*<sup>261</sup> confirmed the abandonment of the scintilla rule and held that defendants, directors of a life insurance company, were therefore entitled to have a particular issue found for them in a life insurance case.<sup>262</sup> In *Ryder v. Wombwell*,<sup>263</sup> the jury gave a verdict for the plaintiff, a jeweler who supplied a silver gilt cup and other items to a wealthy minor, the defendant, who was the son of a baronet.<sup>264</sup> The Court of Exchequer held that the trial judge should have directed a verdict for the defendant as to the cup, because it was not a necessity and therefore the agreement for its purchase could be voided.<sup>265</sup>

By the mid-nineteenth century, English popular and legal publications were filling up with criticism of jurors.<sup>266</sup> Property qualifications had been dropped, and a jury might contain poor and uneducated persons.<sup>267</sup> In 1844, an editorial in *The Times* of London described the “blunder-headed stupidity” of juries that “alternates with pertinacious malevolence” to produce perverse verdicts.<sup>268</sup> This distrust of juries, combined with respect for English judges, led to the gradual suppression of civil jury trial in England, beginning especially with the County Courts Act of 1846, and encouraged by the Common Law Procedure Act of 1854.<sup>269</sup>

#### 4. *American Doubts About the Jury*

Beginning during the Civil War, many American commentators also expressed strong doubts about the jury. In 1861, an anonymous reviewer in the *North American Review*, an influential general-interest review of wide circulation, praised the control English judges had over civil verdicts and urged American judges to follow their lead.<sup>270</sup> Far

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<sup>260</sup> *Id.* at 1463 (Maule, J.).

<sup>261</sup> *Wheelton v. Hardisty*, (1857) 120 Eng. Rep. 86 (K.B.).

<sup>262</sup> *Id.* at 98 (Erle, J.).

<sup>263</sup> *Ryder v. Wombwell*, (1868) 4 L.R. Exch. 32.

<sup>264</sup> *Id.* at 39 (Willes, J.).

<sup>265</sup> *Id.* at 38–39.

<sup>266</sup> See Conor Hanly, *The Decline of Civil Jury Trial in Nineteenth-Century England*, 26 J. LEGAL HIST. 253, 261–62 (2005).

<sup>267</sup> *Id.* at 262.

<sup>268</sup> Editorial, *TIMES* (London), Mar. 20, 1844, at 5; see also, e.g., 13 *THE JURIST*, Aug. 11, 1849, at 294.

<sup>269</sup> Hanly, *supra* note 266, at 253–55.

<sup>270</sup> William Forsyth, *History of Trial by Jury*, 92 N. AM. REV. 297, 308–09 (1861) (“English judges at the present day, in civil cases, doubtless convinced of the untrustworthiness of verdicts,

from being any longer a “necessity,” jury trial had become a “burden.”<sup>271</sup> “The duties now discharged by the court and jury should be allotted to a single tribunal, composed of one or more persons, trained by study and practice for judicial office, and skilled in the investigation of facts.”<sup>272</sup>

Later in the nineteenth century, criticisms of juries grew sharper still.<sup>273</sup> High immigration and growing populist hostility toward railroads and other large corporations caused educated elites to distrust juries. The concerns about juries mirrored the growing concerns about universal suffrage. An unsigned article in the *Atlantic Monthly* in 1879 summarized the change.<sup>274</sup> The article declared that “[t]he democratic principle . . . reached its culmination about 1850,” but since then “[w]e have received . . . an almost unlimited immigration of adult foreigners, largely illiterate, of the lowest class and of other races.”<sup>275</sup> Increasingly, “the most intelligent classes of the community” were manifesting a “feeling of distrust and fear in regard to the holders of sovereign power.”<sup>276</sup> Commentators complained that juries had “‘developed agrarian tendencies of an alarming character;’ and that damage suits invariably went in favor of individuals and against corporations.”<sup>277</sup> Judicial comments and arguments by counsel show

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practically invade the province of the jury, and instruct them what and how to decide; and a verdict is always set aside by the court, if the judge who tried the cause states that he is not satisfied with its correctness. The English have always adhered to the form after they have abandoned the substance, and the constant practice of their judges is a virtual admission of the inability of their common-law system to produce correct results in judicial trials. Our own judges have not as yet had the independence and strength to follow their English brethren in this inroad upon the peculiar province and function of the jury.”)

<sup>271</sup> *Id.* at 309.

<sup>272</sup> *Id.*

<sup>273</sup> Note, *The Changing Role of the Jury in the Nineteenth Century*, 74 *YALE L.J.* 170, 190–92 (1964).

<sup>274</sup> *Limited Sovereignty in the United States*, *ATLANTIC MONTHLY*, Feb. 1879, at 184, 185–89.

<sup>275</sup> *Id.*

<sup>276</sup> *Id.* at 185; see also Charles F. Adams, Jr., *The Protection of the Ballot in National Elections*, *J. SOC. SCI.*, June 1869, at 91, 108–09; Francis Parkman, *The Failure of Universal Suffrage*, 127 *N. AM. REV.* 1, 7 (1878).

<sup>277</sup> Note, *supra* note 273, at 191–92. The few studies of jury verdicts in personal injury cases in the late nineteenth and early twentieth centuries suggest that juries found in favor of plaintiffs about seventy percent of the time. See KARSTEN, *supra* note 22, at 99; Lawrence M. Friedman & Thomas D. Russell, *More Civil Wrongs: Personal Injury Litigation, 1901–1910*, 34 *AM. J. LEGAL HIST.* 295, 309 (1990); Schwartz, *supra* note 22, at 1764 (finding, in a study of all tort cases filed against railroad company defendants in Los Angeles County between 1889 and 1895, twenty-six verdicts for plaintiffs and thirteen for defendants). Only about ten to twenty percent of cases filed reached jury trial. Lawrence M. Friedman, *Civil Wrongs: Personal Injury Law in the Late 19th Century*, 1987 *AM. B. FOUND. RES. J.* 351, 355 (1987); Friedman & Russell, *supra*, at 307.

fear of jury bias.<sup>278</sup> Counsel for a defendant corporation in an 1891 case in California pleaded that his client not be “handed over to the tender mercies of another anti-corporation jury.”<sup>279</sup> Railroads were special targets of populist ire.<sup>280</sup>

### 5. *Federal Cases*

Federal and state courts manifested concerns with juries and repeatedly cited the four English cases discussed above in abandoning the scintilla rule.<sup>281</sup> The U.S. Supreme Court, in *Improvement Co. v. Munson*,<sup>282</sup> cited the four cases in commenting that

[f]ormerly it was held that if there was what is called a scintilla of evidence in support of a case the judge was bound to leave it to the jury, but 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 upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the onus of proof is imposed.<sup>283</sup>

*Munson* concerned conflicting claims over ownership of land in Pennsylvania.<sup>284</sup> The trial court directed the jury to find for the plaintiffs on the ground that there was insufficient evidence of authorization of a particular survey.<sup>285</sup> The U.S. Supreme Court upheld the trial court’s decision.<sup>286</sup>

In *Pleasants v. Fant*,<sup>287</sup> the U.S. Supreme Court clarified the standard for a directed verdict, and held that a trial court should direct a verdict when it would set aside a contrary verdict as against the weight

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<sup>278</sup> See, e.g., *Dawson v. Louisville & Nashville R.R. Co.*, 4 Ky. L. Rptr. 801, 810 (1883) (“Owing to the fact that there is in some localities a popular prejudice against corporations, the courts should, whether the verdict is to be special or general, be careful to have the jury pass upon, *first*, the facts necessary to constitute negligence; *secondly*, if negligence is found, the facts which should determine the amount of a verdict for compensatory damages; and *thirdly*, the elements which should be *clearly* proved to their satisfaction, to authorize them to go beyond the rule of compensation; *fourthly*, the amount of damages to be assessed under either head.”); see also Schwartz, *supra* note 22, at 1764–65 nn.356–57.

<sup>279</sup> *Bellegarde v. S.F. Bridge Co.*, 27 P. 20, 20 (Cal. 1891).

<sup>280</sup> LANGBEIN, LERNER & SMITH, *supra* note 69, at 898–900, 1021–25.

<sup>281</sup> See, e.g., *Improvement Co. v. Munson*, 81 U.S. (14 Wall.) 442, 448 (1871).

<sup>282</sup> *Improvement Co. v. Munson*, 81 U.S. (14 Wall.) 442 (1871).

<sup>283</sup> *Id.* at 448 (emphasis removed).

<sup>284</sup> See *id.* at 442–43.

<sup>285</sup> See *id.* at 446.

<sup>286</sup> *Id.* at 451–52.

<sup>287</sup> *Pleasants v. Fant*, 89 U.S. (22 Wall.) 116 (1874).

of the evidence.<sup>288</sup> The Court cited *Munson*, and the English cases *Jewell v. Parr* and *Ryder v. Wombwell*.<sup>289</sup> The Court emphasized the need for judicial control over wayward juries: “It is the duty of a court in its relation to the jury to protect parties from unjust verdicts arising from ignorance of the rules of law and of evidence, from impulse of passion or prejudice, or from any other violation of his lawful rights in the conduct of a trial.”<sup>290</sup> The Court also used strong language about new trials: “Must the court go through the idle ceremony . . . of submitting to the jury the testimony on which plaintiff relies, when it is clear to the judicial mind that if the jury should find a verdict in favor of plaintiff that verdict would be set aside, and a new trial had? Such a proposition is absurd . . . .”<sup>291</sup>

By 1879, spurred on by the growing number of personal injury cases against railroads in federal court,<sup>292</sup> the U.S. Supreme Court described directing a verdict when a contrary verdict would be set aside for insufficient evidence as a “duty” of the federal trial judge: “Such is the constant practice, and it is a convenient one. It saves time and expense. It gives scientific certainty to the law in its application to the facts and promotes the ends of justice.”<sup>293</sup> The Court consistently quoted this language through the late nineteenth and early twentieth centuries in cases involving directed verdict, many of which concerned personal injury suits against railroads.<sup>294</sup>

## 6. *Changing Standards in the State Courts: Docket Pressure*

Many state courts followed the lead of the English and federal courts in changing the standard for a directed verdict or nonsuit.<sup>295</sup>

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<sup>288</sup> *Id.* at 116 (The trial court had instructed the jury: “There is no evidence in this cause from which the jury can find that the defendant had such an interest in the purchase and sale of the cotton by Keene & Co. as will make him, the defendant, a partner as to third persons, and the jury will, therefore, find their verdict for defendant.” (internal quotation marks omitted)).

<sup>289</sup> *Id.* at 121 n.9.

<sup>290</sup> *Id.* at 121.

<sup>291</sup> *Id.* at 122.

<sup>292</sup> Ann Woolhandler and Michael Collins have discussed federal courts’ use of directed verdicts in personal injury cases against railroads. Woolhandler & Collins, *supra* note 2, at 641.

<sup>293</sup> *Bowditch v. City of Boston*, 101 U.S. 16, 18 (1879).

<sup>294</sup> *See, e.g., Pa. R.R. Co. v. Chamberlain*, 288 U.S. 333, 343 (1933) (quoting same language); *Barrett v. Virginian Ry. Co.*, 250 U.S. 473, 476 (1919) (quoting same language).

<sup>295</sup> *See, e.g., In re Sharon’s Estate*, 177 P. 283, 288 (Cal. 1918) (en banc) (“It is not necessary that there should be an absence of conflict in the evidence. To deprive the court of the right to exercise this power [to direct a verdict], if there be a conflict, it must be a substantial one. There are numerous decisions to this effect.”); *see RULING CASE LAW, supra* note 181, at 1068–69; WIGMORE, *supra* note 2, at 296–99.

These courts often cited growing dockets and the desire to avoid new trial as reasons for the decisions.

Courts in the late nineteenth century were under great pressure to improve the efficiency of adjudication by avoiding new trial. Dockets had rapidly increased, and not only was the number of cases rising, but their complexity was increasing as well.<sup>296</sup> The personal injury cases that crowded dockets in the late nineteenth century, thanks to railroads and growing industrialization, were often much more complicated than the simple debt cases that had dominated caseloads earlier in the century. Questions of negligence often involved a number of witnesses, and sometimes experts, and presented complicated legal issues.

Some scholars, including Wigmore, have argued that the various standards for directed verdict were all so malleable that it did not much matter which a court chose.<sup>297</sup> One scholar even called the scintilla doctrine a “judicial legend.”<sup>298</sup> The courts, however, seemed to believe that the standard they announced made a difference. At least, the standard allowing directed verdict when a contrary verdict would be set aside for insufficient evidence was thought to make a difference in improving the efficiency of litigation.

In 1892, the Supreme Court of Iowa in *Meyer v. Houck*<sup>299</sup> declared that although it had long followed the rule that a motion to direct a verdict should be treated as a demurrer (which the court equated with the scintilla rule), it was changing the standard to allow a court to direct a verdict when the court would set aside a contrary verdict for insufficient evidence.<sup>300</sup> The Iowa Supreme Court extensively quoted English and federal decisions—including *Jewell v. Parr*, *Ryder v. Wombwell*, and *Pleasants v. Fant*—and cited state decisions

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<sup>296</sup> George Fisher has described courts’ “exploding civil caseload” in the late nineteenth century: “Between 1880 and 1900, the number of negligence suits filed in Boston jumped from about 120 to about 3,300.” GEORGE FISHER, PLEA BARGAINING’S TRIUMPH: A HISTORY OF PLEA BARGAINING IN AMERICA 111–14, 123 (2003) (explaining that this docket pressure encouraged courts to accept plea bargains in criminal cases); see also John Fabian Witt, *The Transformation of Work and the Law of Workplace Accidents, 1842–1910*, 107 YALE L.J. 1467, 1483 (1998).

<sup>297</sup> See, e.g., WIGMORE, *supra* note 2, at 296–99; Woolhandler & Collins, *supra* note 2, at 639–40.

<sup>298</sup> Fleming James, Jr., *Sufficiency of the Evidence and Jury-Control Devices Available Before Verdict*, 47 VA. L. REV. 218, 218–19 (1961).

<sup>299</sup> *Meyer v. Houck*, 52 N.W. 235 (Iowa 1892).

<sup>300</sup> *Id.* at 236–37. The plaintiffs alleged that their debtor, a defendant, mortgaged property to his wife, the other defendant, in order to defraud the plaintiffs. *Id.* at 235. The trial judge directed a verdict for plaintiffs, and the jury returned the verdict as directed. *Id.*

as well, favoring this standard.<sup>301</sup> The Iowa Supreme Court declared that it was “high time” that the state should adopt “the more consistent and logical practice which now generally prevails elsewhere,” and emphasized the practical benefits of the change.<sup>302</sup> The new standard “will be of material advantage in the trial of cases in the saving of the time of the trial courts,—time which ought to be devoted to the transaction of legitimate business,—and the saving of court expenses to the counties . . . .”<sup>303</sup>

Use of new standards facilitated direction of a verdict for the party having the burden of proof.<sup>304</sup> Indeed, the Iowa Supreme Court in *Meyer v. Houck* approved a directed verdict for the plaintiffs.<sup>305</sup>

The railroads, with their related quests for efficiency in adjudication and avoidance of jury verdicts, were some of the most powerful litigants pushing state courts to adopt new standards. Railroads faced enormous numbers of lawsuits from a variety of sources,<sup>306</sup> and had great incentives to end them quickly and favorably. As explained above, railroads suffered from popular hostility and therefore sought to avoid juries unfettered by peremptory instructions.<sup>307</sup>

Railroads did not always succeed in persuading courts to adopt new standards, at least in the short term. Courts, however, felt their influence throughout the United States. In Kentucky, for instance, the Court of Appeals permitted directed verdict (in addition to instructing the jury “as in case of a nonsuit”), but adhered to the scintilla rule.<sup>308</sup> Very few negligence actions appear in the Kentucky

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<sup>301</sup> *Id.* at 236–37.

<sup>302</sup> *Id.* at 237.

<sup>303</sup> *Id.*

<sup>304</sup> MILLAR, *supra* note 2, at 307; WIGMORE, *supra* note 2, at 300–05; Sunderland, *supra* note 39, at 200.

<sup>305</sup> *Meyer*, 52 N.W. at 235.

<sup>306</sup> FRIEDMAN, *supra* note 15, at 468; LANGBEIN, LERNER & SMITH, *supra* note 69, at 1021.

<sup>307</sup> *See supra* Part III.A.2.

<sup>308</sup> *See Thompson v. Thompson*, 56 Ky. (17 B. Mon.) 22, 28 (1856) (“It is not the business of the court, when testimony has been produced upon both sides conducing to establish the positions of both parties, to interpose, by way of peremptory instruction, and take from the jury a consideration and comparison of the testimony of both sides of the controversy.”). The case concerned the validity of a will. *Id.* at 27. The Court of Appeals of Kentucky held that the trial court’s peremptory instruction in favor of the will was invalid, because there was some evidence against it and therefore a factual issue for the jury to decide. *See id.* at 27–28, 31. The Court of Appeals agreed with the trial court that the evidence against the will was weak, compared with the evidence in favor, and that, if the jury had found against the will, the trial court should have set aside the verdict and ordered a new trial. *Id.* at 27–28. There had already been a hung jury in the case, and it appeared that the trial court was trying to prevent another. *Id.* at 27. Counsel for the proponents of the will argued that will contests were particularly apt to provoke disagreement among jurors, and it was time for judges to step in with strong instructions:

reports before the 1880s. Kentucky abolished the disqualification of civil parties for interest in 1872.<sup>309</sup> Beginning in the 1880s, railroads in reported Kentucky cases began to request directed verdicts in personal injury actions against them. In *Buford v. Louisville & Nashville Railroad Co.*,<sup>310</sup> a personal injury suit against a railroad, the Superior Court of Kentucky (an intermediate appellate court) expressed astonishment that the scintilla rule applied to motions for directed verdict.<sup>311</sup> The court suggested that the Court of Appeals was confusing directed verdict with instructing the jury as in case of a nonsuit.<sup>312</sup> The Superior Court expressed even more surprise at the reason given by the Court of Appeals: that a new trial would allow a litigant to strengthen his proof, whereas a peremptory instruction would end the case.<sup>313</sup> The Superior Court retorted: “Now there can be no doubt that the policy of the law is that litigation shall be speedily ended.”<sup>314</sup>

Despite the decisions of the Court of Appeals, the Superior Court decided to brush aside the scintilla rule and apply a new standard:

nothing is more calculated to bring reproach upon the jury system than a rule which requires a judge to sit as a figure-head upon the bench, and allow juries, under the influence of passion, or prejudice or sympathy, to bring in verdicts which

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On every jury you will find some who think it their duty to decide whether the testator has made his will according to law; others who esteem it their duty to inquire whether the testator has made a just distribution of his property. The consequence is that in many courts there can not be had a finding in either way. Dead men's estates are going to waste, and justice stands still. Is it not, then, a time for the rigorous exercise of all the power which the courts possess? What practical good is to result from sending this case back if, in the opinion of this court, there is no rational mind which could decide this will invalid? None, it is supposed.

*Id.* at 25. The appellate court agreed that “a strange prejudice exists in the minds of some against last wills and testaments, unless they make what, in their opinion, is an equal distribution of the testator's property among his children.” *Id.* at 31. Still, the court would not give trial courts greater powers to direct verdicts.

<sup>309</sup> See Fisher, *supra* note 188, at 669.

<sup>310</sup> *Buford v. Louisville & Nashville R.R. Co.*, 5 Ky. L. Rptr. 503 (1883).

<sup>311</sup> *Id.* at 505 (“We confess our surprise at the extreme view taken of this matter by the Court of Appeals.”).

<sup>312</sup> *Id.* at 504 (“This [standard] seems to the court an entire misconception of the office of a peremptory instruction. It must grow out of a confusion of terms; failing to draw the distinction between a peremptory instruction and an instruction to find as in case of a non suit, which follows upon the conclusion of plaintiff's testimony before the defendant's side has been heard.”).

<sup>313</sup> *Id.*

<sup>314</sup> *Id.* at 505 (“[W]e do not believe that it was ever intended that a complainant should be allowed to experiment two or three times with the court and jury to see whether he can make out a case strong enough to entitle him to a verdict.”).

the court knows at the time will have to be set aside because “not sustained by sufficient evidence.”<sup>315</sup>

After the conclusion of evidence on both sides, the trial judge had directed a verdict for the defendant railroad.<sup>316</sup> The Kentucky Superior Court denied plaintiff’s motion for a new trial, on the ground that the evidence for defendant, although not uncontradicted, was overwhelming.<sup>317</sup> *Buford* went to the Kentucky Court of Appeals, which affirmed its adherence to the scintilla rule for directed verdicts.<sup>318</sup> The Court of Appeals therefore reversed the judgment and remanded.<sup>319</sup> Because of the scintilla rule, through the 1880s the Kentucky Court of Appeals regularly reversed directed verdicts or nonsuits for defendant railroads.<sup>320</sup>

#### B. *The Effect of Substantive Tort Doctrines: Contributory Negligence, Fellow Servant Rule, and Others*

Although railroads could not always persuade state courts to abandon the scintilla rule for directed verdict, they could achieve simi-

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<sup>315</sup> *Id.* at 506. A jury was indeed likely to be moved by “passion, or prejudice or sympathy” in a case such as *Buford*. The plaintiff was a member of a circus that the defendant railroad had contracted to transport. *Id.* at 503. Descending a steep grade, the train cars were thrown from the track “with great violence,” killing several members of the circus and seriously injuring others. *Id.* Plaintiff’s leg was wrenched from the socket at the ankle joint, and was reset but was amputated ten days later because of gangrene. *Id.* Plaintiff sued the railroad for gross negligence in not having sufficient brakes on the cars and in having defective and rotten cross ties on the track. *Id.* at 503–04. The railroad answered by pleading a settlement with the plaintiff. *Id.* at 504. The plaintiff replied that the settlement was procured the day after the wreck, when “his mind and body were so affected by pain and opiates that the transaction was fraudulent and void.” *Id.* The railroad denied the fraud and pleaded confirmation of the settlement after the plaintiff had recovered, which the plaintiff denied. *Id.*

<sup>316</sup> *Id.* at 504.

<sup>317</sup> *See id.* at 508–09.

<sup>318</sup> *Buford v. Louisville & Nashville R.R. Co.*, 6 Ky. L. Rptr. 263, 264 (1884).

<sup>319</sup> *Id.* at 267. The court did not order a new trial because the question of fraud was equitable, and the court believed that the rules of equity applied to such issues. *See id.*

<sup>320</sup> *See, e.g., White v. Cincinnati, New Orleans & Tex. Pac. Ry. Co.*, 12 S.W. 936, 936 (Ky. 1890) (“Such an instruction should not be given, unless, conceding the truth of the evidence offered, and of every fact which it conduces to prove, the party has no case.”); *Eskridge’s Ex’r v. Cincinnati, N.O. & T.P. Ry. Co.*, 12 S.W. 580, 581 (Ky. 1889) (“The well-established rule in this state, in determining whether the court ought or not to give a peremptory instruction, is that it is not enough that the evidence be, in the opinion of the court, such that possibly a new trial should be awarded in case of verdict in favor of the plaintiff, on the ground it would be against the weight of evidence; but, if there be evidence conducing to show a right of recovery, however contradictory it may seem to the court to be, or wherever the preponderance, in the court’s opinion, may be, the plaintiff may insist on a verdict of the jury.”); *Lingenfelter v. Louisville & Nashville Ry. Co.*, 4 S.W. 185, 185 (Ky. 1887).

lar results through the use of substantive tort defenses such as contributory negligence and the fellow servant rule.

In the 1890s, for example, a noticeable shift occurred in Kentucky decisions. Without altering the scintilla standard, the Court of Appeals began to affirm increasing numbers of directed verdicts for defendant railroads. The Court did so based on substantive tort doctrines, especially the defense of contributory negligence.<sup>321</sup> Contributory negligence was particularly valuable to railroads in the numerous track crossing cases.<sup>322</sup> In Kentucky, as in other jurisdictions, the fellow servant rule also facilitated direction of verdicts for defendant railroads.<sup>323</sup> In addition, more precise legal definitions of negligence permitted more frequent direction of verdicts.<sup>324</sup>

A dispute exists in the scholarly literature regarding the extent to which the doctrine of contributory negligence was a barrier to personal injury claims in the nineteenth century. Peter Karsten has argued, against Wex Malone and Lawrence Friedman, that contributory negligence was not much of a barrier to recovery.<sup>325</sup> Karsten argued that by 1900, most jurisdictions in the United States required defendants to prove contributory negligence (as opposed to the few jurisdictions such as New York that required a plaintiff to prove he was free from negligence in order to recover), and that “the high courts of these jurisdictions directed that the question of the plaintiffs’ contributory negligence should be left to the jury.”<sup>326</sup> As the Kentucky cases

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<sup>321</sup> See, e.g., *Meacham’s Adm’r v. Louisville & Nashville R.R. Co.*, 45 S.W. 363, 364 (Ky. 1898) (affirming directed verdict for defendant on grounds of contributory negligence); *Smith v. Louisville & Nashville R.R. Co.*, 30 S.W. 209, 211 (Ky. 1895) (affirming directed verdict for defendant on grounds of lack of negligence and of contributory negligence); *Oatts v. Cincinnati, New Orleans & Tex. Pac. Ry. Co.*, 22 S.W. 330, 331 (Ky. 1893) (affirming directed verdict for defendant on grounds of lack of negligence and of contributory negligence); *White v. Louisville & Nashville R.R. Co.*, 22 S.W. 219, 220 (Ky. 1893) (affirming a verdict directed for defendant railroad in a personal injury action on grounds of contributory negligence); *McDermott v. Ky. Cent. Ry. Co.*, 20 S.W. 380, 382 (Ky. 1892) (affirming a verdict directed for defendant railroad in a personal injury action on grounds of contributory negligence and the legal definition of negligence).

<sup>322</sup> See *supra* note 321.

<sup>323</sup> See, e.g., *Volz v. Cincinnati & Ohio Ry. Co.*, 24 S.W. 119, 119 (Ky. 1893). On the development and effects of the fellow servant rule, see FRIEDMAN, *supra* note 15, at 301–02, 481–84; KARSTEN, *supra* note 22, at 114–27.

<sup>324</sup> See, e.g., *Smith v. Louisville & Nashville R.R. Co.*, 30 S.W. at 210.

<sup>325</sup> Compare KARSTEN, *supra* note 22, at 95–101, with FRIEDMAN, *supra* note 15, at 470–72, and Malone, *supra* note 204, at 164–77. Gary Schwartz found that the Supreme Court of New Hampshire, and to a lesser extent the Supreme Court of California, tended to leave questions of contributory negligence to a jury. Schwartz, *supra* note 22, at 1762–63.

<sup>326</sup> KARSTEN, *supra* note 22, at 98–99. In support of this proposition, he relied mainly on late-nineteenth-century treatises. *Id.* at 366 n.79. Karsten acknowledged that the doctrine’s

illustrate, however, it was not necessarily true that state high courts left the question of contributory negligence to juries, even if the burden was on defendant to prove it and even if the jurisdiction used the scintilla standard.

The increasing success of directed verdicts for the railroads demonstrated the power of the procedure, even in states such as Kentucky that retained the scintilla rule. At first, retaining the scintilla rule resulted in reversing directed verdicts for defendant railroads. A decade later, however, substantive doctrines facilitated directed verdict, and produced results similar to the new standard.

The railroads' success in getting directed verdicts based on substantive tort defenses explains the decline of instructing a jury "as in case of a nonsuit." As described in Part II.F., the defendant had to make a motion to instruct a jury "as in case of a nonsuit" at the close of the plaintiff's evidence.<sup>327</sup> In a personal injury case, that meant that the motion would have to be made before the defendant could introduce evidence to prove a substantive defense such as contributory negligence. It was vital for defendant railroads to be able to introduce evidence in such cases, as a showing of contributory negligence or other defense would defeat recovery and most jurisdictions put the burden of proof of contributory negligence on the defendant.<sup>328</sup> The railroads, therefore, had substantial incentive to request a directed verdict at the close of all the evidence, rather than moving for instruction as in case of a nonsuit at the close of the plaintiff's evidence. As personal injury cases against railroads began to dominate civil dockets, the procedure that required a defendant to move at the close of plaintiff's evidence declined and died. Directed verdict became the motion of choice for defendants, and thus the focus of courts' decisions.

The timing of the decline of instructing a jury as in case of a nonsuit and the rise of directed verdict supports this hypothesis. In Kentucky, the directed verdict, as distinct from the instruction as in case of a nonsuit, seems to have been requested only sporadically until the 1880s. There are only a handful of reported cases up to that time.<sup>329</sup>

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"most common and crucial use by corporate defendants was in railroad crossing, streetcar, and road and sidewalk suits." *Id.* at 99.

<sup>327</sup> See *supra* note 154 and accompanying text.

<sup>328</sup> See, e.g., *supra* note 321.

<sup>329</sup> See, e.g., *Thompson v. Thompson*, 56 Ky. (17 B. Mon.) 22, 22 (1856); *Chiles v. Boothe*, 33 Ky. (3 Dana) 566, 566 (1835); *M'Pherson v. Hickmans*, 17 Ky. (1 T.B. Mon.) 170, 170 (1824); *Hurt v. Miller*, 10 Ky. (3 A.K. Marsh.) 336, 336 (1821). The directed verdict was supposed to be framed in terms of a hypothetical: "if the jury believe the evidence." *Chiles*, 33 Ky. (3 Dana) at

As explained above, negligence cases only began to appear in significant numbers in Kentucky in the 1880s.<sup>330</sup> In the mid-1880s, cases involving a request for a directed verdict begin to appear regularly in the Kentucky reports, and most of these requests were made by defendant railroads in personal injury actions.<sup>331</sup>

At the same time as reported cases involving directed verdicts increased, the numbers of cases concerning instruction as in case of a nonsuit declined. In the 1880s, the reported Kentucky cases involving instruction “as in case of a nonsuit” virtually vanish. I found no reported Kentucky case discussing instruction “as in case of a nonsuit” between 1882 and 1892. In the mid-1890s, there seems to have been a brief revival of the practice.<sup>332</sup> The procedure appears to have ceased entirely after 1895. It was not declared obsolete in Kentucky, but simply seems to have fallen out of favor with defendants. Gradually, other courts that had once accepted the procedure of instructing the jury as in case of a nonsuit switched to directed verdict. Mostly courts did not explicitly disavow the procedure, but, as in Kentucky, it appears to have died off because it lost favor with defendants.<sup>333</sup> Directed verdict took its place, as that procedure allowed consideration of the defendant’s evidence.

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567–68. Kentucky courts held that a peremptory instruction was not appropriate in cases in which there was any conflicting testimony. *Thompson*, 56 Ky. (17 B. Mon.) at 22; *M’Pherson*, 17 Ky. (1 T.B. Mon.) at 170.

<sup>330</sup> See *supra* notes 310–20 and accompanying text.

<sup>331</sup> See, e.g., *Lingenfelter v. Louisville & Nashville R.R. Co.*, 4 S.W. 185, 185 (Ky. 1887); *Nichols v. Chesapeake, Ohio & Sw .R.R. Co.*, 2 S.W. 181 (Ky. 1886); *Tubb’s Adm’r v. Cincinnati S. R.R.*, 13 Ky. Op. 890 (1886). These are only a sampling of the cases during the mid-1880s. In the early 1880s, the Kentucky legislature changed the Code of Practice to encourage special verdicts. Courts sometimes required juries to return a special verdict in cases involving a defendant railroad in a personal injury action. See *Paducah & Elizabethtown R.R. Co. v. Letcher*, 5 Ky. L. Rptr. 153, 154 (1883).

<sup>332</sup> See, e.g., *Chesapeake & Ohio Ry. Co. v. Kobs*, 30 S.W. 6 (1895).

<sup>333</sup> The Illinois Supreme Court was an exception, and it explicitly rejected the procedure, although the practice had once been well-established in that state. See, e.g., *Smith v. Gillett*, 50 Ill. 290, 301 (1869) (“It cannot be denied, that excluding the evidence in this case was an instruction to the jury as in case of a non-suit, a practice which, though once in vogue in this State, has been long since abolished. It is superseded by the more proper mode of an instruction, moved by the defendant to the court, to instruct the jury, if a particular fact essential to a recovery, and alleged in the declaration, has not been proved, then they should find for the defendant.”); *Deshler v. Beers*, 32 Ill. 368, 382–83 (1863) (“The practice of the court precludes it from instructing the jury to find as in case of a nonsuit. The plaintiff in error might, if he chose, have submitted the case to the jury and asked an instruction, that if the jury found that a certain material fact was not proved, they should find a verdict in his favor.”). The Arkansas Supreme Court appeared to abolish the practice in 1847, only to reinstate it several years later. Compare *Carr v. Crain*, 7 Ark. 241, 241 (1847), with *Hill, McLean & Co. v. Rucker*, 14 Ark. 706, 706 (1854).

C. *Backlash Against the Railroads and Efforts to Promote Plaintiffs' Recovery Through Juries*

1. *Limitations on Defenses in Personal Injury Actions and Establishment of Wrongful Death Actions*

As the struggles in New York and Kentucky courts over taking railroad cases away from the jury demonstrate, the railroads sometimes faced opposition in the courts. Some courts chipped away at prorailroad substantive doctrines such as contributory negligence and the fellow servant rule,<sup>334</sup> and even began to develop proplaintiff rules such as last clear chance and *res ipsa loquitur*.<sup>335</sup>

As popular hostility to railroads grew, legislation and even state constitutions also hampered railroad success in personal injury actions. State legislatures enacted attorney-fee-shifting provisions that operated specifically against defendant railroads.<sup>336</sup> (The U.S. Supreme Court, applying a reasonable basis test, held that a Texas provision enacted in 1889 that operated in this manner violated the Equal Protection Clause.<sup>337</sup>) In 1856, Georgia enacted a statute that allowed a railroad employee to recover from the railroad for injuries caused by a fellow servant, so long as the injured worker himself had not been negligent.<sup>338</sup> Other states followed in the 1860s and 1870s.<sup>339</sup> According to John Witt, in the 1870s and 1880s, the labor movement began to focus on reform of work accident law as a central goal.<sup>340</sup> “By 1906, seven state legislatures had abolished the rule of fellow servant while 18 others had modified it insofar as it applied to railroad employment. Twenty state legislatures had modified the assumption-of-risk doctrine; several had even moved to a rule of contributory negligence for

<sup>334</sup> See ELY, JR., *supra* note 176, at 214–16; FRIEDMAN, *supra* note 15, at 475–77; KARSTEN, *supra* note 22, at 122–26; Schwartz, *supra* note 22, at 1759–63; Witt, *supra* note 296, at 1483.

<sup>335</sup> FRIEDMAN, *supra* note 15, at 477–78; KARSTEN, *supra* note 22, at 100–01; William E. Nelson, *From Fairness to Efficiency: The Transformation of Tort Law in New York, 1920–1980*, 47 BUFF. L. REV. 117, 202–07, 209–11 (1999) (describing the shift from contributory negligence to comparative negligence in twentieth-century New York, and the development of *res ipsa loquitur*). Jed Shugerman has discussed scholarly explanations for the turn to strict liability for enterprises in tort doctrine in the twentieth century. Shugerman, *supra* note 22, at 4 n.21. Shugerman argued that the shift began to occur earlier. *Id.* at 4.

<sup>336</sup> See *Gulf, Colo. & Santa Fé Ry. Co. v. Ellis*, 165 U.S. 150, 150, 160–63 (1897) (describing attorney’s-fee-shifting statutes that operated specifically in cases against railroads in Texas, Alabama, Mississippi, Michigan, and Arkansas).

<sup>337</sup> *Id.* at 157–58. The U.S. Supreme Court in *Ellis* discussed the decisions of state supreme courts invalidating similar legislation under the Equal Protection Clause. *Id.* at 160–63.

<sup>338</sup> 1856 Ga. Laws 155.

<sup>339</sup> See FRIEDMAN, *supra* note 15, at 484 n.46.

<sup>340</sup> Witt, *supra* note 296, at 1481–82.

workplace accidents.”<sup>341</sup> Mississippi’s 1890 Constitution limited the fellow servant rule for railroad employees and prohibited employment contracts waiving tort liability.<sup>342</sup> In 1908, Congress enacted the Federal Employer’s Liability Act (“FELA”),<sup>343</sup> covering railroad employees engaged in interstate commerce, which abolished the fellow servant rule and contributory negligence and limited application of assumption of risk.<sup>344</sup>

After Lord Campbell’s Act in 1846 allowed actions by dependents for wrongful death in England, American legislatures followed.<sup>345</sup> The wrongful death provision of Georgia’s employer’s liability law applied only to railroads; in 1874, the Georgia Supreme Court rejected a constitutional challenge to the provision—the defendant claimed it was impermissible special interest legislation—because railroad employees were “engaged in a peculiar and dangerous occupation.”<sup>346</sup> The wrongful death statutes included a variety of damage provisions: Missouri had mandatory damages for wrongful death actions of \$5,000; other statutes capped damages.<sup>347</sup> Beginning with Pennsylvania in 1874, provisions of state constitutions prohibited damage caps in actions for wrongful death or injury to persons or property.<sup>348</sup> All these provisions tended to give juries more power in personal injury cases relative to judges.

## 2. *State Constitutional Provisions Barring Directed Verdict and the Response of the U.S. Supreme Court*

Perhaps the most direct affirmation of jury power—and rejection of judicial control—occurred in two state constitutions. The

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<sup>341</sup> *Id.* at 1483 n.85; see Urofsky, *supra* note 177, at 84. The first worker’s compensation act in the United States, passed in New York in 1910 and followed swiftly by acts in many other states, gave workers injured on the job an alternative to lawsuits in the courts. Witt, *supra* note 296, at 1484.

<sup>342</sup> MISS. CONST. art. 7, § 193.

<sup>343</sup> Federal Employer’s Liability Act (FELA), ch. 149, § 1, 35 Stat. 65 (1908) (codified as amended at 45 U.S.C. § 51 (2006)).

<sup>344</sup> Congress passed a version of FELA in 1906, but the U.S. Supreme Court held that legislation unconstitutional because it covered employees engaged in intrastate as well as interstate commerce. *The Employers’ Liability Cases*, 207 U.S. 463, 504 (1908). The Court held the 1908 legislation, limited to employees in interstate commerce, to be constitutional. *Second Employers’ Liability Cases*, 223 U.S. 1, 46–59 (1912); see ELY, JR., *supra* note 176, at 218–19 n.37; WITT, *supra* note 22, at 137, 189–90.

<sup>345</sup> John F. Witt, *The Long History of State Constitutions and American Tort Law*, 36 RUTGERS L.J. 1159, 1165–71 (2005).

<sup>346</sup> *Georgia R.R. & Banking Co. v. Oaks*, 52 Ga. 410, 414 (1874).

<sup>347</sup> Witt, *supra* note 345, at 1165–68.

<sup>348</sup> PA. CONST. of 1874, art. III, § 21 (amended 1915); see Witt, *supra* note 345, at 1168–69.

Oklahoma Constitution of 1907 provided: “The defense of contributory negligence or of assumption of risk shall, in all cases whatsoever, be a question of fact, and shall, at all times, be left to the jury.”<sup>349</sup> The question of taking these cases from the jury had become politically salient. The Supreme Court of the Territory of Oklahoma had adopted the permissive federal standard for taking a case from a jury in 1903, in a case involving both assumption of risk and contributory negligence.<sup>350</sup> In that case, the trial court had sustained a corporation’s demurrer.<sup>351</sup> The Supreme Court of the Territory applied the federal standard for a directed verdict, but reversed the judgment and allowed the case to go to a jury.<sup>352</sup> The drafters of the Oklahoma Constitution were taking no chances with results in future cases. Arizona’s Constitution, which went into effect in 1912, copied the Oklahoma provision exactly.<sup>353</sup>

The Supreme Courts of Oklahoma and Arizona duly applied these provisions. Each held that courts could not prevent or overturn jury verdicts for plaintiffs on grounds of contributory negligence or assumption of risk, although it would have been the duty of a court to do so in the absence of the constitutional provision.<sup>354</sup> In the Oklahoma case, the decedent had stepped on the track when a train was approaching in full view and was killed.<sup>355</sup>

The provisions were sufficiently dramatic that the U.S. Supreme Court had occasion to address each of them. Indeed, in addressing them the Court made some of its most memorable pronouncements on the effect of the federal Constitution on state jury trial provisions and on the role of the federal trial judge. In the Oklahoma Supreme Court, the defendant, the receiver of a railroad, argued that the Oklahoma provision deprived him of a vested right in his defense of contributory negligence, and therefore violated the Fourteenth Amendment of the U.S. Constitution.<sup>356</sup> The Oklahoma court declared that “‘as a general rule . . . the citizen has no property in a rule of law,’” but that in any event, the accident occurred after the adop-

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<sup>349</sup> OKLA. CONST. art. XXIII, § 6.

<sup>350</sup> *Neeley v. Sw. Cotton Seed Oil Co.*, 75 P. 537, 539 (Okla. 1903).

<sup>351</sup> *Id.* at 538.

<sup>352</sup> *Id.* at 539, 546.

<sup>353</sup> ARIZ. CONST. art. XVIII, § 5; *see* OKLA. CONST. art. XXIII, § 6.

<sup>354</sup> *Inspiration Consol. Copper Co. v. Conwell*, 190 P. 88, 90–91 (Ariz. 1920) (assumption of risk); *Dickinson v. Cole*, 177 P. 570, 570–71 (Okla. 1918) (contributory negligence).

<sup>355</sup> *Dickinson*, 177 P. at 570.

<sup>356</sup> *Id.* at 570–71.

tion of the constitution.<sup>357</sup> The U.S. Supreme Court, per Justice Holmes, agreed that the Oklahoma provision did not violate the Fourteenth Amendment.<sup>358</sup> “There is nothing, however, in the Constitution of the United States or its Amendments that requires a State to maintain the line with which we are familiar between the functions of the jury and those of the Court. It may do away with the jury altogether . . . . [I]t may confer larger powers upon a jury than those that generally prevail. Provisions making the jury judges of the law as well as of the facts in proceedings for libel are common to England and some of the States . . . .”<sup>359</sup>

The states were therefore free to require jury determinations no matter what the evidence, but was a federal court sitting in diversity jurisdiction obliged to follow that rule? In *Herron v. Southern Pacific Co.*,<sup>360</sup> a federal trial court in Arizona directed a verdict for the defendant railroad on the ground of contributory negligence.<sup>361</sup> The Court of Appeals was uncertain whether the trial court had to follow the Arizona constitutional provision, and certified the question to the U.S. Supreme Court.<sup>362</sup> Chief Justice Hughes left no doubt about what federal courts should do. “The function of the trial judge in a federal court is not in any sense a local matter, and state statutes which would interfere with the appropriate performance of that function are not binding upon the federal court under either the Conformity Act or the ‘rules of decision’ Act.”<sup>363</sup> Federal trial courts were to follow the law of relations between judge and jury as the U.S. Supreme Court described it, not as any state provided.<sup>364</sup> That law very

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<sup>357</sup> *Id.*

<sup>358</sup> *Chi., Rock Island & Pac. Ry. Co. v. Cole*, 251 U.S. 54, 55–64 (1919).

<sup>359</sup> *Id.* at 56.

<sup>360</sup> *Herron v. S. Pac. Co.*, 283 U.S. 91 (1931).

<sup>361</sup> *Id.* at 92.

<sup>362</sup> *Id.*

<sup>363</sup> *Id.* at 94; *see also* 28 U.S.C. § 725 (1940) (“The laws of the several States, except where the Constitution, treaties, or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law, in the courts of the United States, in cases where they apply.”); Conformity Act of 1872, ch. 255, §§ 5–6, 17 Stat. 196, 197 (concerning rules of practice).

<sup>364</sup> In the earlier decision of *Slocum v. New York Life Insurance Co.*, 228 U.S. 364 (1913), then-Justice Hughes in dissent had approved of the federal trial court’s following a Pennsylvania statute allowing judgment notwithstanding the verdict, under the Conformity Act. *Id.* at 401 (Hughes, J., dissenting). The question whether federal trial and appellate courts should follow state laws regarding jury practice has grown more complicated after *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938). Among other issues, the line between substance and procedure is often not clear. *See Gasperini v. Ctr. for Humanities, Inc.*, 518 U.S. 415, 428–30 (1996).

much included directed verdict.<sup>365</sup>

In a trial by jury in a federal court, the judge is not a mere moderator, but is the governor of the trial for the purpose of assuring its proper conduct and of determining questions of law. This discharge of the judicial function as at common law is an essential factor in the process for which the Federal Constitution provides.<sup>366</sup>

No matter what power states gave juries, federal courts were to staunchly do their duty to uphold the law. It was important to national interests that the federal courts provide that benefit to litigants in diversity jurisdiction.

### 3. *Legislative Attacks on Directed Verdict and the Response of Courts*

State legislatures rarely tried to prohibit the procedure of directed verdict. A likely cause of this reluctance was courts' oft-stated belief that the ability to pass on the sufficiency of the evidence was a necessary attribute of judicial power.<sup>367</sup> It was to be expected, therefore, that courts would find this authority to be protected by constitutional provisions vesting judicial power in the courts.

As described below, a few states nevertheless attempted legislative prohibitions. Virginia courts thwarted the intent of legislation in that state through drastic procedural maneuvers. Legislation in Minnesota and Wisconsin seemed intended to channel courts' decisions into judgment notwithstanding the verdict rather than directed verdict to promote efficiency. Minnesota courts accepted this channeling, reasoning that judicial power over verdicts was still available. The Wisconsin Supreme Court, however, held the act in that state unconstitutional. In all of these states, the key decisions involved railroads.

Virginia had unusual procedures relating to juries. Virginia was one of a tiny number of states whose courts had asserted that directed verdict was not an accepted practice.<sup>368</sup> Instead, Virginia courts traditionally used a version of demurrer.<sup>369</sup> In the early twentieth century,

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<sup>365</sup> *Herron*, 283 U.S. at 95.

<sup>366</sup> *Id.*

<sup>367</sup> See, e.g., *Perry v. Clarke*, 6 Miss. (5 Howard) 495, 497 (1841); *Thoe v. Chi., Milwaukee & St. Paul Ry. Co.*, 195 N.W. 407, 409 (Wis. 1923).

<sup>368</sup> See, e.g., *Hargrave's Adm'r v. Shaw Land & Timber Co.*, 68 S.E. 278, 280 (Va. 1910); *Taylor v. Baltimore & Ohio R.R. Co.*, 62 S.E. 798, 799 (Va. 1908).

<sup>369</sup> The Virginia legislature codified this procedure in 1906. Act Relating to Demurrers to Evidence, ch. 177, 1906 Va. Acts 301, 301. The Virginia Supreme Court of Appeals rejected the scintilla doctrine in 1905; demurrers were to be sustained if a contrary verdict would be set aside

however, courts generally began to blur previously clear distinctions between different procedures such as demurrer, nonsuit, and directed verdict. Courts were becoming more functionalist and impatient with procedural niceties.<sup>370</sup> In this spirit, several Virginia trial judges began to direct verdicts. The Virginia Supreme Court of Appeals declared that, if a trial judge directed a verdict rather than sustaining a demurrer, the error would be considered harmless as long as sustaining a demurrer would be legally justified.<sup>371</sup>

In so holding, the Supreme Court of Appeals affirmed several directed verdicts in favor of railroads and other corporate defendants in personal injury cases. These decisions drew criticism. One commentator in the *Virginia Law Register* in 1910 regarded “this novel practice” of directing verdicts “as not only a dangerous departure from our well known rules of procedure, and as unnecessary, unwise and inexpedient, but also as an inexcusable and unwarranted usurpation of the functions of the jury by the judge, and a clear violation of our laws and constitution . . . .”<sup>372</sup> This author added darkly: “I know of no case in which any of those trial judges who have indulged in this innovation have sustained a motion to direct a verdict, except in damage suits on motions made by defendant corporations.”<sup>373</sup>

Shortly after, in 1912, the Virginia legislature enacted a statute forbidding a trial court to give “a peremptory instruction directing

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as against the evidence. *Chesapeake & Ohio Ry. Co. v. F.W. Stock & Sons*, 51 S.E. 161, 165 (Va. 1905).

<sup>370</sup> See, e.g., *Thoe*, 195 N.W. at 410 (“Names are not important. As before indicated, a motion to direct a verdict is simply one method of testing the legal sufficiency of the evidence. Whether it is called a demurrer to the evidence, a motion to direct a verdict, request for peremptory instruction, or what not, is immaterial. The thing involved is the power of the court to pass upon the legal sufficiency of the evidence.”).

<sup>371</sup> See, e.g., *Hargrave’s Adm’r*, 68 S.E. at 280 (“Considered as upon a demurrer to the evidence, we are of opinion that the plaintiff’s intestate was not entitled to recover in this case. The action of the trial court in directing the jury to find a verdict for the defendant is assigned as error. While directing a verdict is not in accordance with the practice in this state, yet where it appears, as in this case, that no other verdict could have been properly rendered, the error was harmless, and the judgment will not be reversed on that ground.”); *Taylor*, 62 S.E. at 799 (“[I]t matters not that the circuit court practically directed a verdict for the defendant (which it is conceded is not in accordance with the accepted practice in this state); for it is the well-settled rule of this court that, where it appears that the plaintiff is not entitled to recover in any view of the case, he cannot have been prejudiced by an erroneous instruction.”).

<sup>372</sup> M.J. Fulton, Note, *Directing Verdicts*, 16 VA. L. REG. 241, 251 (1910). The Virginia bar was divided on the use of demurrer as opposed to directed verdict. See *Small v. Va. Ry. & Power Co.*, 99 S.E. 525, 527 (Va. 1919); Editorial, *Directing Verdicts*, 16 VA. L. REG. 384, 384–85 (1910); Samuel C. Graham, Note, *Directing Verdicts*, 16 VA. L. REG. 401, 401 (1910); Editorial, *Instructions Once Again*, 18 VA. L. REG. 141, 143 (1912).

<sup>373</sup> Fulton, *supra* note 372, at 249.

what verdict the jury shall render.”<sup>374</sup> Virginia courts could hardly declare the act unconstitutional, as they had announced many times that the procedure of directed verdict “is not in accordance with the accepted practice in this state.”<sup>375</sup> To get around the prohibition, Virginia courts used several different expedients. One was to give a hypothetical instruction (“if the jury believe the evidence”) stating the facts of the case and which party should prevail.<sup>376</sup> (Virginia judges had never had a tradition of commenting on evidence.<sup>377</sup>) Another, which seems to have become the preferred method, was to strike out or to exclude from the jury all the evidence for plaintiff or for defendant, according to how the trial judge thought the case should come out.<sup>378</sup>

In 1913, the Minnesota legislature enacted a statute that prohibited directing a verdict if the opposing party objected.<sup>379</sup> As explained in Part IV, the Minnesota legislature had previously, in 1895, authorized courts to grant judgment notwithstanding the verdict.<sup>380</sup> The 1913 statute did not disturb that power. (In 1921, the North Dakota legislature followed the 1913 Minnesota statute, and also included a provision authorizing judgment notwithstanding the verdict.<sup>381</sup>)

Prohibiting a directed verdict but allowing judgment notwithstanding the verdict seems contradictory. There were, however, reasons for channeling the decision this way. First, the statute helped to prevent a final decision in the stress of trial, when a trial judge might easily make a mistake. (As explained below, this problem was a ma-

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<sup>374</sup> 1912 Va. Acts 52.

<sup>375</sup> *Hargrave's Adm'r*, 68 S.E. at 280.

<sup>376</sup> *See Small*, 99 S.E. at 527.

<sup>377</sup> *See Lerner*, *supra* note 68, at 260.

<sup>378</sup> *See, e.g., Barksdale v. S. Ry. Co.*, 148 S.E. 683, 686 (Va. 1929); *Fleshman v. Bibb*, 88 S.E. 64, 65 (Va. 1916).

<sup>379</sup> MINN. STAT. § 80.7998 (1913) (“When at the close of the testimony any party to the action moves the court to direct a verdict in his favor, and the adverse party objects thereto, such motion shall be denied and the court shall submit to the jury such issue or issues, within the pleadings on which any evidence has been taken, as either or any party to the action shall request.”).

<sup>380</sup> 1895 Minn. Laws 729–30; *see infra* notes 485–87 and accompanying text.

<sup>381</sup> 1921 N.D. Laws 217 (“When at the close of the testimony any party to the action moves the court to direct a verdict in his favor, and the adverse party objects thereto, such motion shall be denied and the court shall submit to the jury such issue or issues, within the pleadings on which any evidence has been taken, as either or any party to the action shall request, but upon a subsequent motion, by such moving party after verdict rendered in such action, that judgment be entered notwithstanding the verdict, or if the jury have failed to agree upon a verdict, for a directed verdict, the court shall grant the same if, upon the evidence as it stood at the time such motion to direct a verdict was made, the moving party was entitled to such directed verdict.”).

for reason for the enactment of statutes allowing judgment notwithstanding the verdict.) Second, getting a verdict from a jury potentially prevented a new trial. If a judge improperly directed a verdict, which an appellate court overruled, the case would have to be sent back for a new trial. If, however, a judge took a verdict and then erroneously granted judgment notwithstanding the verdict, a corrected judgment could simply be entered on the verdict.<sup>382</sup>

Whatever the reasons for the 1913 statute, railroad officials were concerned about any encroachment on a judge's power to direct a verdict. A railroad soon urged the Minnesota courts to hold the statute unconstitutional.<sup>383</sup> A Minnesota trial court, apparently under the impression (or wanting to believe) that the plaintiff waived any objection under the 1913 statute, directed a verdict for defendant railroad in a case involving a shortage in a shipment of barley.<sup>384</sup> Plaintiff appealed, and the railroad argued vigorously that the statute was unconstitutional.<sup>385</sup> The Minnesota Supreme Court briskly rejected the argument. The court held that, granting that "the Constitution invests courts with the authority to determine whether or not the evidence adduced at a trial proves a cause of action or defense," the statute did not impair the courts' authority.<sup>386</sup> "It merely regulates or postpones the time for its exercise."<sup>387</sup> The courts still had the power to grant judgment notwithstanding the verdict.

The Wisconsin Supreme Court was less tolerant of legislative interference with the courts' process. A Wisconsin statute of 1923 prohibited directed verdict,<sup>388</sup> but the statute did not prohibit judgment notwithstanding the verdict, which the Wisconsin Supreme Court had previously allowed (although the procedure was not well-established).<sup>389</sup> In *Thoe v. Chicago, Minneapolis & St. Paul Railway Co.*,<sup>390</sup>

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<sup>382</sup> See Case Note, *Trial—Taking Case from Jury—Validity of Statute Prohibiting Directed Verdict*, 37 HARV. L. REV. 510, 510 (1924).

<sup>383</sup> *Zimmerman v. Chi. & Nw. Ry. Co.*, 151 N.W. 412, 413 (Minn. 1915).

<sup>384</sup> *Id.* at 412.

<sup>385</sup> *Id.* at 413.

<sup>386</sup> *Id.*

<sup>387</sup> *Id.*

<sup>388</sup> 1923 Wis. Sess. Laws 38 ("Whenever in an action tried before a jury all the parties to the action shall, without reservation, move the court to direct a verdict, such motion shall, unless otherwise directed by the court before the discharge of the jury, be considered as equivalent to a stipulation by the parties waiving a jury trial and submitting the entire case to the court for decision of the facts as well as the law; but in no case where a jury has been selected for the trial of a cause and any testimony been taken or evidence introduced, shall a verdict be directed by the trial judge, except upon consent and stipulation of all parties to the cause, or for error, in which case a new trial shall be had.").

<sup>389</sup> See, e.g., *Muench v. Heinemann*, 96 N.W. 800, 803 (Wis. 1903).

the court held the statute unconstitutional.<sup>391</sup> *Thoe* was a railroad crossing case, and the trial judge directed a verdict for the defendant railroad on the ground of contributory negligence.<sup>392</sup> The Wisconsin Supreme Court declared its continued support for the scintilla standard, by that time rare, but affirmed the directed verdict and held the statute invalid.<sup>393</sup> “From time immemorial, in the common-law courts of this country and in England, it has been the duty and province of the court to determine the legal sufficiency of the evidence.”<sup>394</sup> That authority “is of the very essence of judicial power; that is, the power to determine under the law the rights of parties properly before it.”<sup>395</sup> The court rejected the contention that judicial power was preserved because the courts still had the authority to enter judgment notwithstanding the verdict.<sup>396</sup> The court feared a slippery slope in the diminishment of judicial power.<sup>397</sup> Plaintiff urged the two reasons discussed above, judicial error and the possible need for a new trial, in support of the statute.<sup>398</sup> The court responded that trial courts rarely made mistakes in the decision whether to direct a verdict, and in any event had the power to get a verdict from a jury subject to the opinion of the court on a matter of law in doubtful cases.<sup>399</sup>

#### 4. *A Shift Toward Favoring Jury Power Among Judges and Commentators Starting at the Turn of the Century: The Case of New York*

At the turn of the century, opinion among certain judges and legal commentators started to shift in favor of greater jury autonomy.<sup>400</sup>

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<sup>390</sup> *Thoe v. Chi., Milwaukee & St. Paul Ry. Co.*, 195 N.W. 407 (Wis. 1923).

<sup>391</sup> *Id.* at 411.

<sup>392</sup> *Id.* at 408.

<sup>393</sup> *See id.* at 409–10.

<sup>394</sup> *Id.* at 408–09.

<sup>395</sup> *Id.* at 409.

<sup>396</sup> *Id.* at 410 (“What is the legal effect of submitting a case to the jury for its verdict? It is under all circumstances a determination by the court that the evidence is legally sufficient to warrant a finding by the jury in favor of either of the parties to the cause.”).

<sup>397</sup> *See id.* at 410–11 (“An infraction of the Constitution is to be measured, not by its size, but by its character. If the exercise of judicial power may be thus diminished and limited, it is subject to further and other limitations.”).

<sup>398</sup> *See id.*

<sup>399</sup> *Id.* at 411. The court also commented on what it perceived as a growing impatience with separation of powers, and also hewed to the notion of judicial duty, as opposed to judicial policy choices. *See id.*

<sup>400</sup> William Nelson has remarked that in the twentieth century generally, appellate courts in New York strove to protect jury power from intrusions by trial courts. Nelson, *supra* note 4, at 1189. He also briefly observed that New York courts could not direct a verdict on a disputed question of fact. *Id.* at 1191. The account here generally accords with those statements, and

Out of concern to provide recovery for plaintiffs in personal injury cases, a few state courts tightened the standard for directed verdict.<sup>401</sup> These courts essentially seem to have tried to return to the scintilla standard. At about this time, some legal commentators also seemed sympathetic to jury power, and began to raise concerns about constitutional rights to jury trial which had been almost wholly ignored before.<sup>402</sup> As described below, in response to decisions of the New York courts that limited directed verdicts, the New York legislature tried to restore the previous standard for directing a verdict. Concern about the proliferation of new trials caused by the limitation of directed verdict seems to have motivated the legislation. Many of the

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reveals a complicated history. Nelson describes other rules to support the proposition that “[i]n the early 1920s, the [New York] courts openly interpreted the rules [of jury trial] to favor typically upper-class defendants and thereby to prevent use of the law, especially in tort cases, to redistribute wealth from the rich to the poor.” *Id.* Although it may be true that some specific interpretations of rules favored defendants, the crucial judicial decisions permitting jury trial and limiting directed verdict did not operate in favor of defendants compared with late nineteenth century decisions; quite the contrary.

<sup>401</sup> See, e.g., *McDonald v. Metro. St. Ry. Co.*, 60 N.E. 282, 283 (N.Y. 1901). Several decades later, the Illinois Supreme Court issued a similar holding. *Blumb v. Getz*, 8 N.E.2d 620, 622–23 (Ill. 1937). In *Blumb v. Getz*, plaintiff’s own witnesses testified that the deceased, while walking on the side of a highway with his back to traffic, stepped into the road. *Id.* at 621. As he bent to pick up a glove, the defendant’s car hit him. *Id.* The defendant was traveling about fifty miles per hour and was twenty or twenty-five feet away from the deceased when he stepped into the road. *Id.* at 621–22. In Illinois, the plaintiff had to show, as part of the prima facie case, that the deceased was free from contributory negligence. See *Newell v. Cleveland, Cincinnati, Chi. & St. Louis Ry. Co.*, 104 N.E. 223, 224 (Ill. 1914). The trial court denied the defendant’s motion for a directed verdict, and the jury brought in a verdict for the plaintiff. *Blumb*, 8 N.E.2d at 622–23. The intermediate court of appeals granted judgment notwithstanding the verdict. *Id.* at 621. The Illinois Supreme Court reversed, because the deceased might have seen the oncoming car and believed he had time to get out of the way. *Id.* A new trial was necessary. *Id.* at 622–23. A case note in *The University of Chicago Law Review* complained that the decision was “a throwback to the ‘scintilla of evidence’ rule,” and that it “emasculates” the judicial power to direct a verdict and to grant judgment notwithstanding the verdict. Note, *Practice—Scintilla of Evidence Held Sufficient to Prevent Directed Verdict*, 5 U. CHI. L. REV. 315, 316–17 (1938). The case was contrary to the trend to give judges more power to direct verdicts. *Id.* at 317. The author speculated that judicial hostility toward the minority rule requiring a plaintiff to prove lack of contributory negligence might have caused the decision. *Id.* Regardless of the reason, the result was “deplorable” because it was likely to cause repeated new trials. *Id.* at 318.

<sup>402</sup> See, e.g., Note, *supra* note 182, at 257 (arguing that a strong power to direct verdicts was “undermining our cherished tradition that the determination of such facts is for the jury”); Editorial, *Direction of Verdicts in Jury Cases*, 1 N.Y. L. REV. 97, 99–103 (1923) (questioning the constitutionality of legislation expanding directed verdict); Fulton, *supra* note 372, at 251 (calling directed verdict “a clear violation of [Virginia’s] laws and constitution”); Hackett, *supra* note 2 (laying out an extended argument that the directed verdict procedure violates the Seventh Amendment); Note, *supra* note 181, at 515 (complaining that courts were too zealous in encouraging directed verdicts and questioning the constitutionality of the procedure); Smith, *supra* note 138, at 125–32 (discussing and favoring the constitutionality of the legislation).

major cases in New York concerned personal injury actions against railroads or street car companies.

In the late nineteenth century, the New York Court of Appeals had several times firmly declared that a verdict should be directed when the opposite verdict would be set aside as contrary to the evidence.<sup>403</sup> At the very beginning of the twentieth century, however, the Court of Appeals decisively swung in the other direction, back toward the scintilla rule. The court began to emphasize that the credibility of contradictory witnesses was for the jury to determine.<sup>404</sup> The leading case, *McDonald v. Metropolitan Street Railway Co.*,<sup>405</sup> concerned an action against a streetcar company for personal injuries resulting in the death of the plaintiff's intestate.<sup>406</sup> The trial court directed a verdict for the defendant.<sup>407</sup> The Court of Appeals declared that although "there was a direct and somewhat severe conflict in the evidence, the questions of negligence and contributory negligence were clearly of fact, and were for the jury, and not for the court, unless the right of trial by jury has been partially, if not wholly, abolished."<sup>408</sup> A court could set aside a verdict as against the weight of the evidence and grant a new trial, but it could not direct a verdict unless there was "no evidence" to sustain an opposite verdict.<sup>409</sup>

Following *McDonald*, New York courts adhered to a rule that, in a case in which there was some evidence on both sides of a factual dispute, the case would go to a jury without a peremptory instruc-

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<sup>403</sup> See, e.g., *Leinkauf v. Lombard*, 33 N.E. 472, 474-75 (N.Y. 1893) (citing numerous New York, English, and federal cases); *Hemmens v. Nelson*, 34 N.E. 342, 346 (N.Y. 1893) (after five trials in the case, stating that "this court is now firmly committed to the more modern and reasonable rule" declared in *Leinkauf v. Lombard*); *Dwight v. Germania Life Ins. Co.*, 8 N.E. 654, 661-62 (N.Y. 1886). One 1887 case, however, suggested a different standard for setting aside a verdict than for directing a verdict. *Bagley v. Bowe*, 11 N.E. 386, 389 (N.Y. 1887).

<sup>404</sup> In an action by an endorsee against the drawer of a check, there were three trials, all resulting in a verdict for the plaintiff. *Fealey v. Bull*, 57 N.E. 631, 631 (N.Y. 1900). After the first trial, the appellate division set aside the verdict as against the weight of the evidence, and as the evidence remained substantially the same at the later trials, the defendant argued that the trial court should have directed a verdict. *Id.* The court of appeals disagreed. "Where, however, the right to a verdict depends on the credibility to be accorded witnesses, and the testimony is not incredible or insufficient as a matter of law, the question of fact is for the jury to determine." *Id.* at 632. The court held that the plaintiff's story "was not incredible, as a matter of law, though it contained improbabilities, and may have been open to suspicion. In some matters she was contradicted by the defendant's witnesses." *Id.*

<sup>405</sup> *McDonald v. Metro. St. Ry. Co.*, 60 N.E. 282 (N.Y. 1901).

<sup>406</sup> *Id.* at 282.

<sup>407</sup> *Id.* at 283.

<sup>408</sup> *Id.*

<sup>409</sup> *Id.*

tion.<sup>410</sup> As the scintilla rule had earlier, this rule sometimes led to protracted struggles between judges and juries. A jury would bring in a verdict which a trial or appellate court considered unjustified, the court would set aside the verdict, and a subsequent jury or juries would render a similar verdict on substantially the same evidence. Often courts would give up after the second jury verdict, but sometimes three or even four trials would be held in the same case.<sup>411</sup> The cases in which judge and jury tended to disagree most were cases brought against a railroad or corporation.<sup>412</sup> Two separate legal commentators remarked that these contests between judges and juries were “undignified.”<sup>413</sup> One of the commentators also mentioned the expense and inefficiency of repeated trials.<sup>414</sup>

Because of this problem of repeated trials, the New York legislature in 1921 added a new section to the New York Civil Practice Act: “The judge may direct a verdict when he would set aside a contrary verdict as against the weight of the evidence.”<sup>415</sup> The provision provoked a vigorous discussion among members of the bar. In 1923, the New York legislature voted to repeal the section, but Governor Al Smith vetoed the repeal.<sup>416</sup> Smith, who became the Democratic candidate for president in 1928, was a Progressive advocate of reforms promoting governmental efficiency.<sup>417</sup> The provision provoked several

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<sup>410</sup> See, e.g., *Getty v. Roger Williams Silver Co.*, 116 N.E. 381, 382 (N.Y. 1917); *Seyford v. S. Pac. Co.*, 111 N.E. 248, 248–49 (N.Y. 1916); *Padbury v. Metro. St. Ry. Co.*, 75 N.Y.S. 952, 952 (N.Y. App. Div. 1902).

<sup>411</sup> Editorial, *supra* note 402, at 98–99; Smith, *supra* note 138, at 122–23.

<sup>412</sup> See, e.g., *Meinrenken v. N.Y. Cent. & Hudson Riv. R.R. Co.*, 92 N.Y.S. 1015, 1016–17 (N.Y. App. Div. 1905) (“This judgment is based upon a verdict which, in the opinion of this court, the jury had no right to render, and it has so declared on the two previous appeals.”) (setting aside the third jury verdict for plaintiff as against the weight of the evidence); *Williams v. Del., Lackawanna & W. R.R. Co.*, 80 N.Y.S. 945, 946 (N.Y. App. Div. 1903) (allowing a fourth jury verdict for plaintiff to stand); *McCann v. N.Y. & Queens Cnty. Ry. Co.*, 76 N.Y.S. 684, 685–86 (N.Y. App. Div. 1902) (allowing a fourth jury verdict for plaintiff to stand).

<sup>413</sup> Editorial, *supra* note 402, at 99 (adding that the situation is “unsatisfactory and confusing”); Smith, *supra* note 138, at 122.

<sup>414</sup> Smith, *supra* note 138, at 123.

<sup>415</sup> 1921 N.Y. Laws 149 (codified as New York Civil Practice Act § 457-a). Three separate commentators identified the problem of repeated new trials as the cause of the legislation. Note, *supra* note 182, at 257; Editorial, *supra* note 402, at 99; Smith, *supra* note 138, at 124.

<sup>416</sup> Smith, *supra* note 138, at 111.

<sup>417</sup> ROBERT A. SLAYTON, *EMPIRE STATESMAN: THE RISE AND REDEMPTION OF AL SMITH* 156–69, 259 (2001).

commentators to discuss its constitutionality,<sup>418</sup> but New York courts repeatedly dodged the constitutional question.<sup>419</sup>

In the following decades, New York appellate courts often adopted an interpretation of the provision that contradicted its purpose, and indeed its words, and seemed to return to the *McDonald* test.<sup>420</sup> The New York Court of Appeals in the middle of the twentieth century actually cited *McDonald* as good authority when interpreting the section, completely reversing the intent of the statute.<sup>421</sup> In 1949, the New York Judicial Council stated: “There should no longer be any question but that a trial court may not direct a verdict simply because it would set aside a contrary verdict as against the weight of the evidence.”<sup>422</sup> Trial judges occasionally protested the judicial gutting of the statute.<sup>423</sup> In 1962, the legislature removed mention of the standard when it recodified New York civil procedure in the Civil Practice Law and Rules.<sup>424</sup>

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<sup>418</sup> See *supra* note 402.

<sup>419</sup> See, e.g., *Loewinthan v. Le Vine*, 87 N.E.2d 303, 305 (N.Y. 1949); *Goldberg v. Price*, 205 N.Y.S. 391, 391 (N.Y. App. Term 1924).

<sup>420</sup> See, e.g., *Loewinthan*, 87 N.E.2d at 305–06; *Blum v. Fresh Grown Preserve Corp.*, 54 N.E.2d 809, 810–11 (N.Y. 1944); *Wearever Upholstery & Furniture Corp. v. Home Ins. Co.*, 141 N.Y.S.2d 107, 109–10 (N.Y. App. Div. 1955).

<sup>421</sup> See, e.g., *Blum*, 54 N.E.2d at 811.

<sup>422</sup> N.Y. JUDICIAL COUNCIL, FIFTEENTH ANNUAL REPORT 250 (1949). The Report elaborated: “Briefly, a trial court may under existing case law direct a verdict when, looking only to the evidence of the party against whom the motion for a directed verdict is made and accepting as true the testimony of that party’s witnesses, the court would be required to set aside a verdict in favor of the party against whom the motion was interposed on the ground that the evidence was as a matter of law insufficient to support such a verdict.” *Id.*

<sup>423</sup> A trial judge in 1956, for example, remarked that “the credible evidence obviously established plaintiff’s attempt at suicide” in an action against the New York City Transit Authority for injuries suffered from being run over by a subway car. *Buccanon v. N.Y.C. Transit Auth.*, 151 N.Y.S.2d 188, 188 (N.Y. Sup. Ct. 1956). Nevertheless, because of appellate court decisions, he felt obliged to allow the case to go to a jury without a peremptory instruction. *Id.* at 189. The jury returned a verdict for the plaintiff, which the judge then set aside as against the weight of the evidence. *Id.* The judge commented that the discrepancy between the plain words of the statute and the interpretation of the appellate courts put trial judges in a difficult position. *Id.* He recommended either that the statute be repealed, or that the appellate courts “reaffirm support for directed verdicts in accordance with the requirements of the statute.” *Id.*

<sup>424</sup> 1962 N.Y. Laws ch. 308, as amended by 1962 N.Y. Laws ch. 315, § 1 (codified at N.Y. C.P.L.R. Rule 4401 (McKinney 2006)) (“Any party may move for judgment with respect to a cause of action or issue upon the ground that the moving party is entitled to judgment as a matter of law, after the close of the evidence presented by an opposing party with respect to such cause of action or issue, or at any time on the basis of admissions. Grounds for the motion shall be specified.”).

D. *Growing Interest in Finality and Avoiding the Form of Submitting a Case to a Jury*

1. *Finality*

In the late nineteenth and early twentieth centuries, courts increasingly emphasized the finality of directed verdict to further efficiency in adjudication. Courts stressed that a directed verdict was a final decision on the merits and was *res judicata*,<sup>425</sup> and therefore unlike a nonsuit.<sup>426</sup> In 1903, the Nebraska Supreme Court scolded a trial court which had granted plaintiff's motion to dismiss an action without prejudice after the court had decided to direct a verdict for defendant, but before the court had actually directed the jury.<sup>427</sup> The Nebraska Supreme Court compared the dismissal without prejudice to granting the plaintiff a new trial after he had been fairly defeated, and declared forcefully: "[I]t would be a reproach to our judicial system to permit a defeated litigant to abandon his case and sue again, thus harassing the defendant and wasting money raised by taxation for public purposes."<sup>428</sup>

2. *The Jury Verdict Under the Judge's Direction As a "Ministerial Act" and "Useless"*

The procedure of actually requiring a jury verdict under the judge's direction may have eased the transition from decision by the jury to decision by the judge, but late nineteenth and early twentieth century judges grew increasingly impatient with such "useless" formalities.<sup>429</sup> The Nebraska Supreme Court, in the 1903 case described above, called this standard procedure of the judge directing, the jury agreeing, and the clerk recording "mere ceremonial acts," "conven-

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<sup>425</sup> See, e.g., *McCown v. Muldrow*, 74 S.E. 386, 392 (S.C. 1912).

<sup>426</sup> *Id.* at 392 ("A motion for a nonsuit, on the ground that there is no testimony tending to sustain the material allegations of the complaint, does not involve the merits, and the granting of such motion would not support a plea of *res adjudicata*."); *In re Sharon's Estate*, 177 P. 283, 289 (Cal. 1918) (en banc) ("A verdict directed by the court is a decision upon the merits of the case. The one important difference in this respect between a judgment of nonsuit and a judgment on a directed verdict is that the latter is a bar to another action for the same cause, while the former is not."); MILLAR, *supra* note 2, at 300.

<sup>427</sup> *Bee Bldg. Co. v. Dalton*, 93 N.W. 930, 931 (Neb. 1903) (suit for personal injury).

<sup>428</sup> *Id.* (rejecting the argument that the dismissal was within the discretionary power of the trial court, as there was no surprise, mistake, accident, or suggestion plaintiff did not produce all the evidence obtainable); see also *Gooch v. Coleman*, 109 So. 18, 19 (Miss. 1926) (holding that it was not error for a trial court to refuse to grant a nonsuit if the request was made after the court had announced it would give a peremptory instruction for the defendant); *Schaffer v. Deemer Mfg. Co.*, 66 So. 736, 737 (Miss. 1914) (same).

<sup>429</sup> *Bee Bldg. Co.*, 93 N.W. at 931.

tional procedure,” and “judicial formalism.”<sup>430</sup> The court criticized this procedure as “useless and idle,” and remarked that “it would be legal and logical, and in harmony with modern methods of transacting business,” for the trial judge simply to render judgment for the defendant if the plaintiff had failed to make a case, rather than going through the form of submitting the case to the jury.<sup>431</sup> Other courts agreed that the jury’s acquiescence in a directed verdict was “mere ceremony.”<sup>432</sup>

### 3. *The Problem of Recalcitrant Jurors*

Special difficulties arose with the procedure of formally submitting the case to the jury in those rare instances in which the jury refused to acquiesce in the judge’s direction. As described in Part II.A., before the Civil War, the remedy for a jury verdict against the judge’s direction was a new trial.<sup>433</sup> Another jury was needed to bring in the correct verdict. In the late nineteenth and early twentieth centuries, judges had less concern with preserving the appearance of jury power.<sup>434</sup> As discussed below, courts approved of pressuring recalcitrant jurors, even of threatening them with contempt, and increasingly allowed trial judges to bypass verdicts of full juries altogether in directed verdict cases. In the process, the procedure of directed verdict became ever more distinct from that of comment on the evidence. Judges’ growing power also became more open.

Courts approved various methods to pressure jurors to give the correct verdict. Appellate courts in the late nineteenth century told trial judges not to allow a jury to retire for deliberations after a peremptory instruction, to help prevent a jury from finding a contrary verdict. Jurors were to stay in their seats in the jury box, without consulting with one another, and give the verdict as directed. The Supreme Court of Pennsylvania so advised a trial court in 1884.<sup>435</sup> The plaintiff in that case had sued a tax collector for trespass.<sup>436</sup> The Pennsylvania Supreme Court indignantly declared that there was no evi-

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<sup>430</sup> *Id.*

<sup>431</sup> *Id.*

<sup>432</sup> *See, e.g.,* *Marion v. Home Mut. Ins. Ass’n of Iowa*, 217 N.W. 803, 805 (Iowa 1928); *see also* cases cited *infra* note 464.

<sup>433</sup> *See supra* Part II.A.2. Some courts also permitted involuntary nonsuit, if the verdict should have been for the defendant. This procedure allowed the plaintiff to try again with another jury.

<sup>434</sup> *See* Lon Hocker, Jr., *Motion for Judgment Notwithstanding Jury’s Disobedience to Direction of Verdict*, 4 *INS. COUNS. J.*, Oct. 1937, at 64, 65–70.

<sup>435</sup> *Wade v. Fahrig*, 4 *Pennyp.* 252, 255 (Pa. 1884).

<sup>436</sup> *Id.* at 253.

dence whatsoever to support the action.<sup>437</sup> The trial judge directed a verdict for the defendant, but then allowed the jury to retire, and the jury came in with a verdict for the plaintiff.<sup>438</sup> The appellate court announced: “Of course, this could not be . . . [I]t was the necessary duty of the court to take a verdict from the jury in favor of the defendant, and not permit them to retire.”<sup>439</sup> After such an instruction, to allow the jury to come in with a contrary verdict “was simply bringing the Court and the administration of justice into contempt.”<sup>440</sup> The Pennsylvania Supreme Court reversed the judgment on the verdict, with no suggestion of a new trial.<sup>441</sup>

In the widely cited case of *Curran v. Stein*,<sup>442</sup> the Court of Appeals of Kentucky in 1901 approved of a trial judge threatening recalcitrant jurors with contempt,<sup>443</sup> 231 years after *Bushell's Case* prohibited fining or imprisoning jurors for giving a verdict against the judge's direction.<sup>444</sup> In *Curran v. Stein*, the plaintiff sued the defendants, officers of the remains of a reorganized railroad, for money allegedly due him for investigating and adjusting claims against the railroad.<sup>445</sup> The trial judge directed a verdict for the defendants.<sup>446</sup> As soon as the court gave the peremptory instruction, a number of jurors in their seats refused to sign a verdict for the defendants.<sup>447</sup> The trial judge then ordered the jurors to retire to the jury room, and told them “that, if they did not return a verdict as directed, he would send them somewhere else.”<sup>448</sup> In other words, he threatened to have them jailed for contempt of court. “After some time” the jury returned with the verdict: “In obedience to the peremptory instruction of the court, we, the jury, find for the defendants.”<sup>449</sup> The Kentucky Court of Appeals approved of the trial court's threat. A peremptory instruction “must be obeyed”: “The verdict, though in form the act of the jury, is really the act of the court,” and it was appropriate that the jury's verdict

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<sup>437</sup> *Id.* at 254 (“It seems incredible that such a case as this could pass the ordeal of a court of justice.”).

<sup>438</sup> *Id.* at 255.

<sup>439</sup> *Id.*

<sup>440</sup> *Id.*

<sup>441</sup> *Id.*

<sup>442</sup> *Curran v. Stein*, 60 S.W. 839 (Ky. 1901).

<sup>443</sup> *See id.* at 840.

<sup>444</sup> *Bushell's Case*, (1670) 124 Eng. Rep. 1006 (C.P.) 1009–10, Vaughan 137, 141–43.

<sup>445</sup> *Curran*, 60 S.W. at 839.

<sup>446</sup> *Id.* at 840.

<sup>447</sup> *Id.*

<sup>448</sup> *Id.*

<sup>449</sup> *Id.*

referred to the court's instruction.<sup>450</sup> To allow the jury to disobey the court's direction "would be to vest the jury with power to review the decision of the court on the law of the case."<sup>451</sup> The Court remarked that in some jurisdictions the practice in such cases was to discharge the jury and enter the judgment.<sup>452</sup>

Some courts disapproved of coercing jurors, and permitted bypassing a verdict of the full jury. The Supreme Court of California, in the influential decision *In re Sharon's Estate*,<sup>453</sup> held that a verdict could be taken from three jurors when the other nine disagreed with the court's peremptory instruction.<sup>454</sup> Appellant sought to prevent distribution of an estate according to the terms of the will, in which he was not mentioned.<sup>455</sup> He claimed that he was the adopted son and only child of the decedent, and therefore entitled to half the estate.<sup>456</sup> At trial, appellant's evidence that he was adopted was weak.<sup>457</sup> The trial court directed the jury to find a verdict for the beneficiaries under the will.<sup>458</sup> Nine of the jurors refused to agree to that verdict, and the trial judge then designated one of the other three jurors to act as foreman, and to sign the verdict.<sup>459</sup> Appellant's counsel asked that the jury be polled, but the trial court refused, and entered a decree of distribution in accordance with the will.<sup>460</sup>

The California Supreme Court approved the trial court's actions and rejected the idea that the only way a judge could enforce a peremptory instruction was to proceed against recalcitrant jurors for contempt: "It is obvious that this might easily prove ineffectual or impracticable, for in such event the refractory jurors would be able to

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<sup>450</sup> *Id.*

<sup>451</sup> *Id.* The Court of Appeals, however, exercised its power to review the trial judge's decision on the law, and decided that the peremptory instruction was inappropriate, as there was evidence for the plaintiff to go to a jury. *Id.* (citing *Thompson v. Thompson*, 56 Ky. (17 B. Mon.) 22 (1856) and *Buford v. Louisville & Nashville R.R. Co.*, 5 Ky. L. Rptr. 503 (1883)).

<sup>452</sup> *Id.* The Supreme Court of Mississippi, however, held that a trial court could not simply disregard a jury's verdict against direction and enter the opposite judgment, and that therefore pressuring the jury to return the correct verdict may have been appropriate. *Banfill v. Byrd*, 84 So. 227, 228–29 (Miss. 1920).

<sup>453</sup> *In re Sharon's Estate*, 177 P. 283 (Cal. 1918) (en banc).

<sup>454</sup> *Id.* at 284, 289.

<sup>455</sup> *Id.* at 284.

<sup>456</sup> *Id.*

<sup>457</sup> *Id.* at 287. Appellant claimed that the adoption had taken place in San Francisco in 1892; the 1906 earthquake and fire destroyed all court records, including adoption records, in San Francisco for that time. *Id.*

<sup>458</sup> *Id.* at 284.

<sup>459</sup> *Id.*

<sup>460</sup> *Id.*

compel a new trial and thus defeat the exercise by the court of a power which it clearly possesses.”<sup>461</sup> A jury was bound by instructions on law, and therefore by a peremptory instruction. “In giving a verdict upon such an order, the jurors do not exercise discretion, but act ministerially as the instrument by which the court prepares the record which will support the only judgment that can lawfully be given.”<sup>462</sup> The court compared the actions of the jury in such a case with the actions of the court clerk: “[The jurors] are no more at liberty to refuse obedience than is the clerk when he is directed to do the ministerial act of entering an order or judgment of the court.”<sup>463</sup>

Some courts permitted dispensing with the jury verdict entirely, and simply allowed a trial judge to enter judgment on the court’s decision to direct a verdict.<sup>464</sup> The U.S. Court of Appeals for the Seventh Circuit urged such a course in 1896 in *Cahill v. Chicago, Minneapolis & St. Paul Railway Co.*,<sup>465</sup> a case in which a juror refused to follow the trial court’s peremptory instruction.<sup>466</sup> Plaintiff sued a railroad for personal injuries, including the loss of both feet, caused by an engine backing into her; she had been crossing the tracks at a place where persons were accustomed to cross morning and evening while going to and from work.<sup>467</sup> The trial court directed a verdict for the defendant, on the ground that the place where the plaintiff crossed “was not to be considered a crossing,” and therefore the defendant was not liable for simple negligence.<sup>468</sup> The jurors refused to give a verdict for the de-

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<sup>461</sup> *Id.* at 289.

<sup>462</sup> *Id.*

<sup>463</sup> *Id.* The court added: “In such a case the polling of the jury is a mere useless ceremony and the law does not require it.” *Id.*

<sup>464</sup> *See, e.g., Vitamin Milling Corp. v. Superior Court*, 26 P.2d 497 (Cal. Dist. Ct. App. 1933) (holding that a trial court may base a judgment on an order to direct a verdict); *Marion v. Home Mut. Ins. Ass’n of Iowa*, 217 N.W. 803, 805 (Iowa 1928) (“The signing of a verdict under direction of the court is a mere formality, and may be followed or omitted with equal legality.”); *Hairston v. Montgomery*, 59 So. 793, 794 (Miss. 1912) (“Had the peremptory instruction requested by appellants been granted, it would not have been necessary for the court to have gone through the useless formality of having the jury to retire and actually find the verdict directed; but the court should simply have rendered judgment as if upon verdict found.”); *State ex rel. Witte Hardware Co. v. McElhinney*, 100 S.W.2d 36, 39 (Mo. App. 1937) (holding that a trial judge, faced with a jury which refused to follow the judge’s peremptory instruction, “might unquestionably have compelled the jury’s obedience to his direction by holding it otherwise in contempt,” but that “it was the power and duty of the court, both to preserve its own dignity and to secure plaintiff’s valuable right, to discharge the jury and cause judgment to be entered up in plaintiff’s favor without the formality of a directed verdict”).

<sup>465</sup> *Cahill v. Chi., Milwaukee & St. Paul Ry. Co.*, 74 F. 285 (7th Cir. 1896).

<sup>466</sup> *Id.* at 289.

<sup>467</sup> *Id.* at 286.

<sup>468</sup> *Id.* at 287.

fendant, and the judge then told the jury: “Very well. You may retire to your room, and return with such a verdict as you may find.”<sup>469</sup> The jury returned unable to reach an agreement, with one juror still refusing to find for defendant.<sup>470</sup> The trial judge permitted plaintiff’s counsel to stipulate that a judgment of dismissal might be entered, to have the same effect as a verdict for defendant under direction of the court, to which the plaintiff excepted.<sup>471</sup> The Seventh Circuit strongly condemned the recalcitrant juror, and stated he was liable to be punished with contempt.<sup>472</sup> (The Seventh Circuit’s harsh criticism is the more notable because it reversed the trial court’s direction of the verdict for the defendant.<sup>473</sup> The appellate court held that the railroad owed a duty of reasonable care where persons were accustomed to cross the tracks without objection by the railroad.<sup>474</sup>) The court remarked, however, that “it is not essential that there be a written verdict signed by jurors or by a foreman.”<sup>475</sup> “[I]n cases where the court thinks it right to do so, it may announce its conclusion in the presence of the jury and of the parties or their representatives, and direct the entry of a verdict, without asking the formal assent of the jury.”<sup>476</sup>

In 1963, an amendment to Rule 50(a) of the Federal Rules of Civil Procedure codified this practice, discussed in Part V.B.

#### IV. JUDGMENT NOTWITHSTANDING THE VERDICT: AVOIDANCE OF NEW TRIAL

Trial judges often had to decide motions for directed verdict quickly, soon after the close of evidence. This rush did not allow a judge to consult the trial transcript, newly available thanks to the system of taking down court testimony in shorthand.<sup>477</sup> In 1906, the

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<sup>469</sup> *Id.* at 289.

<sup>470</sup> *Id.*

<sup>471</sup> *Id.*

<sup>472</sup> *Id.* at 290 (“The conduct of the juror in this instance was in the highest degree reprehensible, and might well have subjected him, and any who encouraged him to persist in his course, to punishment for contempt. His conduct was in violation of the law, subversive of authority, and obstructive of the orderly administration of justice. In fact, by his course he put in jeopardy the interests which he assumed to protect, because it is only by treating the case as if the verdict directed had been returned that we have been able to review the judgment and to order a new trial.”).

<sup>473</sup> *See id.* at 287.

<sup>474</sup> *Id.*

<sup>475</sup> *Id.* at 290.

<sup>476</sup> *Id.*

<sup>477</sup> *See, e.g.*, 1907 Pa. Laws 136 (providing for the appointment of official stenographers).

Pennsylvania Supreme Court commented on the increasing pressure on trial courts to decide motions for directed verdict in a hurry:

No doubt when time was not urgent and trials were conducted leisurely, with full argument on every point as it arose, the system [of directed verdict] worked fairly well. But with the growing complexity of issues, the constantly increasing pressure upon the trial lists, the taking of testimony in shorthand, and the consequent hurry of trials, the inconveniences became burdensome.<sup>478</sup>

Also, the jury was waiting to receive instruction and could not be held for long periods. The need for a speedy judicial decision was part of the cost of the concentrated common law jury trial. Commentators complained that, because of rushed decisionmaking, trial judges frequently erred in denying motions for directed verdict.<sup>479</sup>

Once a trial judge had denied a motion for directed verdict and the jury brought in a verdict, traditional common law rules made it difficult to avoid a new trial to correct jury error. The common law motion for judgment *non obstante veredicto* traditionally could only be made by the plaintiff, and could only be based on the record—that is, the pleadings—and not the evidence at trial.<sup>480</sup> (The corresponding motion for the defendant was motion in arrest of judgment, also based only on the pleadings.<sup>481</sup>) By statute or by judicial decision, judgment *non obstante veredicto* became available to either party in a number of states, but the requirement of relying on the pleadings persisted.<sup>482</sup>

Although courts were willing to innovate in developing the directed verdict, they generally waited for legislatures to authorize judgment notwithstanding the verdict based on the evidence.<sup>483</sup> A number of courts held that without a statute, a court could not entertain a motion to examine the evidence to overturn a verdict and give judgment for the other party.<sup>484</sup> Courts held this cursorily, without giving

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<sup>478</sup> *Dalmas v. Kemble*, 64 A. 559, 559 (Pa. 1906).

<sup>479</sup> See, e.g., Pierce, *supra* note 36, at 93; Ezra Ripley Thayer, Harvard Law Sch., Address Before the Law Association of Philadelphia (Jan. 25, 1915), in *Judicial Administration*, 63 U. PA. L. REV. 585, 587–88 (1915).

<sup>480</sup> Pierce, *supra* note 36, at 93.

<sup>481</sup> MILLAR, *supra* note 2, at 324.

<sup>482</sup> *Cruikshank v. St. Paul Fire & Marine Ins. Co.*, 77 N.W. 958, 958 (Minn. 1899).

<sup>483</sup> An exception was Wisconsin, whose courts permitted judgment notwithstanding the verdict without a statute. See *Muench v. Heinemann*, 96 N.W. 800, 803 (Wis. 1903).

<sup>484</sup> See, e.g., *Tribune Co. v. Dunlap Mfg. Co.*, 201 Ill. App. 408, 409–10 (Ill. App. Ct. 1916); *Stevens v. City of Chariton*, 168 N.W. 310, 311 (Iowa 1918); *Christian v. Yarborough*, 32 S.E. 383, 384 (N.C. 1899); *Bank of Commerce of Sulphur v. Webster*, 172 P. 943, 944 (Okla. 1918); see Pierce, *supra* note 36, at 94 n.4.

reasons apart from citing the common law rule. They may have believed they had latitude to preserve questions of law for the judge by directing a verdict, but once a jury had returned a verdict after deliberation, entering judgment for the other party based on the evidence seemed too extreme an interference to undertake without statutory authorization.

State legislatures began to provide for judgment notwithstanding the verdict, in order to avoid a new trial when a judge should have directed a verdict. Minnesota seems to have been the first to do so, in 1895.<sup>485</sup> The Minnesota statute allowed either party to move for judgment notwithstanding the verdict, or in the alternative for a new trial.<sup>486</sup> Both the trial court and the appellate court (the state supreme court) could hear the motion and enter judgment.<sup>487</sup> A number of other states followed Minnesota.<sup>488</sup>

Some courts downplayed the novelty of the new procedure, and interpreted the statutes cautiously. The Minnesota Supreme Court in 1899, for example, declared that, in enacting the statute permitting judgment notwithstanding the verdict, “the legislature was not creating a new remedy, but merely extended, as has been done in many

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<sup>485</sup> 1895 Minn. Laws 729–30; see Pierce, *supra* note 36, at 94.

<sup>486</sup> 1895 Minn. Laws 729–30.

<sup>487</sup> The statute read:

In all cases where at the close of the testimony in the case tried, a motion is made by either party to the suit requesting the trial court to direct a verdict in favor of the party making such motion, which motion was denied, the trial court on motion made that judgment be entered notwithstanding the verdict, or on motion for a new trial, shall order judgment to be entered in favor of the party who was entitled to have a verdict directed in his or its favor; and the supreme court of the state on appeal from an order granting or denying a motion for a new trial in the action in which such motion was made may order and direct judgment to be entered in favor of the party who was entitled to have such verdict directed in his or its favor whenever it shall appear from the testimony that the party was entitled to have such motion granted.

*Id.* The Minnesota legislature amended the statute several times. In 1913, the legislature required the trial court to deny a motion for directed verdict whenever the opposing party objected to it, and to take the verdict of the jury. The trial or appellate court could then enter judgment notwithstanding the verdict. 1913 Minn. Laws 336–37. In 1915, the legislature removed the requirement of denying a motion to direct a verdict. 1915 Minn. Laws 37–38. In 1917, the legislature allowed a judgment to be entered after an erroneous refusal to direct a verdict when the jury disagreed and were discharged. 1917 Minn. Laws 40–41. For more discussion of the evolution of the Minnesota statute, see EDSON R. SUNDERLAND, *CASES ON PROCEDURE ANNOTATED: TRIAL AND APPELLATE PRACTICE* 435–36 n.77 (1924).

<sup>488</sup> See, e.g., 1909 Mass. Acts 174–75 (entitled: “An Act To provide for expediting the final determination of causes”); 1905 Pa. Laws 286; *Roe v. Standard Furniture Co.*, 83 P. 1109, 1109–10 (Wash. 1906) (citing Ballinger’s Ann. Codes & St. §§ 5056, 6521); see also Pierce, *supra* note 36, at 94 n.6.

other states, the common-law remedy to cases where, upon the evidence, either party was clearly entitled to judgment.”<sup>489</sup> In that case, a farmer had sued an insurance company to recover on a hail policy, and the defense was that the insured had not given notice of loss under the terms of the policy.<sup>490</sup> The trial court denied the insurance company’s motion to direct a verdict, and the jury gave a verdict for the farmer.<sup>491</sup> The Minnesota Supreme Court refused to enter judgment notwithstanding the verdict, even though there was a total absence of evidence on a material point, because it appeared probable that the plaintiff had a good cause of action and any technical defect in the evidence could be cured in another trial.<sup>492</sup>

## V. DIRECTED VERDICT, JUDGMENT NOTWITHSTANDING THE VERDICT, AND THE DRAFTERS OF THE FEDERAL RULES

### A. *The Principal Drafters’ Views About Jury Control*

Charles Clark and especially Edson Sunderland, the academics who became the principal drafters of the Federal Rules of Civil Procedure, wrote extensively about the changes that had occurred in jury trial giving judges more power.<sup>493</sup> These included directed verdict and judgment notwithstanding the verdict. Clark and Sunderland considered the civil jury to be a wasteful anachronism.<sup>494</sup> Their views were part of Progressive and later New Deal opinion putting faith in professional expertise.<sup>495</sup> In their academic writings, they championed giving

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<sup>489</sup> *Cruikshank v. St. Paul Fire & Marine Ins. Co.*, 77 N.W. 958, 959 (Minn. 1899).

<sup>490</sup> *Id.* at 958.

<sup>491</sup> *Id.*

<sup>492</sup> *Id.*

<sup>493</sup> *See supra* note 39; *see also* SUNDERLAND, *supra* note 487.

<sup>494</sup> *See, e.g.*, Sunderland, *supra* note 12.

<sup>495</sup> Jerome Frank’s devastating critique of juries, published in 1949 when he was a judge on the U.S. Court of Appeals for the Second Circuit, encapsulates the views of his New Deal colleagues and of other critics of the jury system. JEROME FRANK, COURTS ON TRIAL: MYTH AND REALITY IN AMERICAN JUSTICE 126–45 (1949). Frank recommended abolition of the jury, “except perhaps in criminal trials.” *Id.* at 145. He immediately remarked, however, that it was his duty as a judge to apply the rules that were supposed to govern jury trials. *Id.*

Frank’s decisions as a judge reflect the ability to set aside his personal views about the jury. For example, Frank incurred the disapproval of his colleague Charles Clark in voting to reverse a grant of summary judgment in *Arnstein v. Porter*, 154 F.2d 464, 470 (2d Cir. 1946) (Frank, J.); *see id.* at 475–80 (Clark, J., dissenting). Judge Learned Hand voted with Frank in the case. Likewise, in *Dyer v. MacDougall*, 201 F.2d 265 (2d Cir. 1952), Frank concurred separately to distinguish carefully between the standard for granting a new trial and the standard for directing a verdict. *Id.* at 271–72 (Frank, J., concurring). Frank declared his philosophy on the subject in another opinion: “[W]hatever may be the views of judges about the jury system, it is their duty to maintain the function of the jury in all jury trials, until the jury is abolished by legislation and constitutional amendment.” *United States v. Liss*, 137 F.2d 995, 1001 (2d Cir. 1943) (Frank, J.,

the judge more control over jury verdicts.<sup>496</sup> When they drafted the Federal Rules, not surprisingly they codified the federal trial judge's robust powers to direct a verdict or to enter judgment notwithstanding the verdict.<sup>497</sup> Indeed, they took the next logical step and aimed to avoid jury trial altogether. Extensive pretrial discovery,<sup>498</sup> combined with the novel summary judgment provision in Rule 56,<sup>499</sup> gave judges the ability to decide issues without summoning a jury at all.

Although Clark's and Sunderland's faith in professional expertise reflected a central tenet of Progressive and New Deal thought, the idea's application to the legal system long predated those movements. As applied to the civil justice system, greater authority for professional experts—judges—represented a long-term and nearly universal evolution. For well over a century before the advent of the Federal Rules, the legal systems in both England and the United States had been evolving away from jury power and toward judicial control. By the time Clark and Sunderland drafted the Federal Rules in the late 1930s, England had effectively abolished the civil jury.<sup>500</sup> Although some American judges and state legislatures tried to preserve jury power in personal injury cases, the overwhelming trend was to limit civil juries. As technology and commercial transactions grew more complex, and as docket pressure increased, decisionmaking in legal cases by a group of untrained laypersons seemed increasingly anomalous. A populist Democrat such as Senator Thomas Walsh of Montana might argue for more jury power and greater local control, as he did in the congressional debates over the Rules Enabling Act<sup>501</sup> in the 1920s and 30s.<sup>502</sup> But his vision suffered defeat until the newly organized plaintiffs' bar gained strength in the 1950s.<sup>503</sup> Even then, the plaintiffs' bar often preferred efficient settlements to resource-consuming jury trials.<sup>504</sup>

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dissenting in part); see ROBERT JEROME GLENNON, *THE ICONOCLAST AS REFORMER: JEROME FRANK'S IMPACT ON AMERICAN LAW* 156–58 (1985); Jeffrey W. Stempel, *A Distorted Mirror: The Supreme Court's Shimmering View of Summary Judgment, Directed Verdict, and the Adjudication Process*, 49 OHIO ST. L.J. 95, 140–42 (1988).

<sup>496</sup> See, e.g., Sunderland, *supra* note 12.

<sup>497</sup> FED. R. CIV. P. 50(a), (b) (1938).

<sup>498</sup> FED. R. CIV. P. 26–37.

<sup>499</sup> FED. R. CIV. P. 56.

<sup>500</sup> Hanly, *supra* note 266, at 278.

<sup>501</sup> Rules Enabling Act, ch. 651, §§ 1–2, 48 Stat. 1064, 1064 (1934) (codified as amended at 28 U.S.C. §§ 2072–2074 (2006)).

<sup>502</sup> See Subrin, *supra* note 136, at 996–98.

<sup>503</sup> LANGBEIN, LERNER & SMITH, *supra* note 69, at 1060.

<sup>504</sup> *Id.* at 1061.

Edson Sunderland, a professor at the University of Michigan Law School, was primarily responsible for drafting the Rules' unprecedented broad discovery and summary judgment provisions.<sup>505</sup> During the decades before, Sunderland energetically filled the pages of various law reviews with arguments for controlling or abolishing juries.<sup>506</sup> These often highlighted directed verdict or similar procedures.<sup>507</sup> In 1913, Sunderland wrote an article about directed verdict for parties having the burden of proof.<sup>508</sup> He painstakingly sorted into categories many state and federal decisions on the subject.<sup>509</sup> To facilitate courts' ability to direct such verdicts, he proposed a theory: courts were to treat a party's failure to deny or to impeach evidence as an implied admission.<sup>510</sup> This doctrine of implied admissions gave the courts the theoretical basis on which to direct verdicts for the party having the burden of proof.<sup>511</sup> Sunderland expressed his concern forcefully: "Juries cannot be permitted to exercise blind and unreasoning power to oppress litigants. They must conduct themselves as sensible and reasonable men. They cannot be suffered to base verdicts on caprice, conjecture, passion or prejudice."<sup>512</sup>

As plaintiffs typically have the burden of proof on most issues, it might be thought that Sunderland's article was generally proplaintiff. When Sunderland was writing, however, most states put the burden of proof of contributory negligence on the defendant. Immediately after

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<sup>505</sup> On Sunderland's role in drafting the Federal Rules, see Subrin, *supra* note 11, at 697–729.

<sup>506</sup> See, e.g., Edson R. Sunderland, *The English Struggle for Procedural Reform*, 39 HARV. L. REV. 725, 727 (1926) ("Nothing in the legal development of modern society is more dramatic than the long war of liberation waged in England against the tyranny of inherited legal traditions."); Edson R. Sunderland, *Verdicts, General and Special*, 29 YALE L.J. 253, 258 (1920) ("The general verdict is as inscrutable and essentially mysterious as the judgment which issued from the ancient oracle of Delphi. Both stand on the same foundation—a presumption of wisdom. The court protects the jury from all investigation and inquiry as fully as the temple authorities protected the priestess who spoke to the suppliant votary at the shrine. It is quite probable that the law is wise in not permitting jurors to testify as to how they compounded their verdict, for all stability would disappear if such inquiries were open. But it does not follow that there is not some better way of deciding controversies than by means of this mysterious agency. If the compound cannot be subjected to analysis perhaps it can be dispensed with.").

<sup>507</sup> Sunderland's interest in methods of jury control is also evident in his 1924 casebook. See SUNDERLAND, *supra* note 487. He included in it long excerpts from cases concerning directed verdict, *see id.* at 416–36, and discussed in detail the history of Minnesota's statute authorizing judgment notwithstanding the verdict, *id.* at 435–36 n.77.

<sup>508</sup> Sunderland, *supra* note 39.

<sup>509</sup> See *id.* at 201–06.

<sup>510</sup> See *id.* at 208.

<sup>511</sup> See *id.* at 209.

<sup>512</sup> *Id.* at 206.

expressing his concerns about juries, Sunderland quoted approvingly from the opinion of a New York judge who criticized a jury's verdict for the plaintiff in a personal injury suit against a railroad.<sup>513</sup> (The judge was E. Darwin Smith, the same judge who had written extended criticisms of juries in the case *Ernst v. Hudson River Railroad Co.*<sup>514</sup>) In this track-crossing case, Judge Smith was concerned that the jury had improperly discredited or disregarded two witnesses for the defendant.<sup>515</sup> Sunderland's remarks about juries and his quotation from the New York case indicate that one scenario he feared was that a jury might disregard "unimpeached, uncontradicted" testimony from a defendant's witness about contributory negligence.<sup>516</sup> In any event, Sunderland clearly favored taking as many questions as possible from the jury.

The following year, in 1914, Sunderland wrote a long article entitled *The Inefficiency of the American Jury*, in which he argued for a return of a strong judicial power to comment on evidence.<sup>517</sup> He remarked that jurors untrained in the law should not decide cases in a sophisticated commercial economy.<sup>518</sup> He praised the continental legal systems, in which decisionmaking was "lodged in courts with a permanent personnel of trained lawyers."<sup>519</sup>

The future reporter of the committee that drafted the Rules, Yale Law School Dean Charles Clark, published an empirical study of juries in Connecticut in 1934 and concluded, with his coauthor Harry Shulman: "Whatever the political, psychological or jurisprudential values of the jury as an institution may be, its use in the civil litigation covered by this study is certainly not impressive. The picture seems to

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<sup>513</sup> *Id.* at 206–07 (quoting *Seibert v. Erie Ry. Co.*, 49 Barb. 583, 586–87 (N.Y. Gen. Term 1867)).

<sup>514</sup> See *supra* text accompanying notes 220–24.

<sup>515</sup> *Seibert*, 49 Barb. at 586–87 ("The positive testimony of an unimpeached, uncontradicted, witness cannot be discredited, or disregarded arbitrarily or capriciously by court or jury. If juries are permitted to discredit or disregard such testimony, there is no safety in the administration of justice, and parties might just as well let the result of a litigation abide the cast of a die, or a game of chance. It belongs to a jury, I admit, in considering the weight of evidence, to pass upon the credit due to the respective witnesses; but this does not imply that they may, without reasonable or justifiable ground, disbelieve any witness. They have no right to discredit an unimpeached, uncontradicted witness, who testifies fairly, and gives clear, rational, consistent and relevant testimony." (citation omitted)). In that case, both the plaintiff and another witness gave testimony that could be construed as contradicting that of the defendant's witnesses. *Id.* at 585.

<sup>516</sup> Sunderland, *supra* note 39, at 206–07 (quoting *Seibert*, 49 Barb. at 586–87).

<sup>517</sup> Sunderland, *supra* note 12, at 302.

<sup>518</sup> *Id.* at 303.

<sup>519</sup> *Id.*

be that of an expensive, cumbersome and comparatively inefficient trial device” that was subject to “exploitation.”<sup>520</sup> The authors recommended sharply limiting the power of juries, including through expanded use of summary judgment and diversion of certain classes of cases to administrative tribunals.<sup>521</sup>

By the time Clark and Shulman were doing their empirical work, automobile accidents had replaced railroad accidents as a major source of personal injury litigation.<sup>522</sup> So dominant were automobile negligence cases that the authors commented: “In the court studied, as elsewhere in the country, the jury has become identified in very major part with automobile accident litigation.”<sup>523</sup> The typical automobile accident did not carry the political ramifications of a railroad accident. Automobile accident cases were likely to involve two private individuals as parties, not a large and powerful corporation that spawned many accidents.<sup>524</sup> In the case of a collision between two automobiles, the force and risk of injury was likely to be roughly equal. As a result

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<sup>520</sup> See Clark & Shulman, *supra* note 39, at 884. The study concerned cases in the Superior Court of New Haven County. The authors found that, of the 571 cases studied during the period 1919–1928 that went to trial, 19, or 3.3%, were resolved by directed verdict. *Id.* at 879.

<sup>521</sup> *Id.* at 879, 884–85; see also Clark & Samenow, *supra* note 39, at 423.

<sup>522</sup> See Clark & Shulman, *supra* note 39, at 871 (finding that, of the 296 negligence cases that went to jury trial in New Haven County between 1919 and 1928 (out of 480 total filed), 193 were automobile cases (of which 330 were filed)); see also WITT, *supra* note 22, at 194–95; Jonathan Simon, *Driving Governmentality: Automobile Accidents, Insurance, and the Challenge to Social Order in the Inter-War Years, 1919 to 1941*, 4 *CONN. INS. L.J.* 521, 539–47 (1998). Ownership of automobiles became widespread in the 1920s, thanks to Henry Ford’s innovations in methods of production. See Simon, *supra*, at 531 (“By the end of the 1920s more than half of American families owned an automobile.”). Railroads, on the other hand, were increasingly subject to safety and other regulation by states and the federal government. See ELY, JR., *supra* note 176, at 110–34, 217–18. Workers’ compensation statutes diverted a number of potential tort claims by employees of railroads, and workplace accident rates fell dramatically. WITT, *supra* note 22, at 9–12, 67, 126–51, 187, 189–94.

<sup>523</sup> Clark & Shulman, *supra* note 39, at 885. The authors further remarked: “Much dissatisfaction has been expressed with this method of administering compensation for such accidents.” *Id.* Clark was part of a committee that drew up the so-called Columbia Plan of 1932, proposing an administrative scheme for imposing liability on the owners of automobiles for injuries, similar to workers’ compensation. See WITT, *supra* note 22, at 195 (discussing the Columbia Plan and other schemes for administrative tribunals to process automobile accident claims); Simon, *supra* note 522, at 567–85 (discussing the Columbia Plan in detail, and reasons for its failure to be adopted).

<sup>524</sup> Automobile insurance did bring corporations into play, but in most states, the considerable majority of motorists did not have accident insurance through the 1920s. See Simon, *supra* note 522, at 564 (“Nationally twenty-seven percent of motor vehicles registered in 1929 were covered by a liability insurance policy. While the numbers of motorists who purchased liability insurance varied enormously, in only twelve states were more than a quarter of all motorists insured. Only Massachusetts made liability coverage a condition for registration . . .”). Insurance companies typically were not parties to accident litigation, and their operations were not

of the shift to automobile accidents, the jury came to seem less a frightening channel of popular hostility, and more an encumbering nuisance. The change is evident in the dismissive tone of Clark's and Shulman's comments on the jury, as opposed to the alarmed tone of earlier writing.<sup>525</sup>

### B. *The Career of Directed Verdict in the Federal Rules*

The drafters could not entirely please themselves in fashioning the Rules. Besides complying with the Seventh Amendment, their draft had to win the approval of the U.S. Supreme Court and not attract serious opposition in Congress.<sup>526</sup> The Advisory Committee therefore had to contend with residual reluctance to interfere too openly with juries. Although the drafters of the Federal Rules were bold in the provisions concerning discovery and summary judgment, they were somewhat cautious in codifying directed verdict in Rule 50(a) and judgment notwithstanding the verdict in Rule 50(b). The original version of Rule 50(a) did not provide that a judge could enter judgment on the decision to direct a verdict alone, without the agreement of the jury.<sup>527</sup> The reason for this caution was most likely that sentiment existed on the Supreme Court for retaining the pretense of a jury verdict. Rule 50(b) did not use the term "judgment notwithstanding the verdict," although it gave the trial judge that power.<sup>528</sup> In designing this part of the Rule, the Advisory Committee had to take into account Supreme Court decisions interpreting the Seventh Amendment's Re-examination Clause.<sup>529</sup>

In 1963, both of these concessions to the jury were eliminated. The Advisory Committee proposed amending Rule 50(a) to permit the trial judge to enter judgment without the form of submission to

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the direct cause of injury. They therefore engendered less popular hostility. On the operation of the early automobile insurance industry, see *id.* at 563–67.

<sup>525</sup> Compare *Sunderland*, *supra* note 39, at 206 (writing in 1913: "Juries cannot be permitted to exercise blind and unreasoning power to oppress litigants."), with *Clark & Shulman*, *supra* note 520, at 884 (describing juries in 1934 as "expensive, cumbersome and comparatively inefficient").

<sup>526</sup> The Rules Enabling Act gave the Supreme Court power to promulgate rules of civil procedure for the federal district courts, and the Court had to approve the Advisory Committee's draft before the rules could be reported to Congress. Rules Enabling Act, ch. 651, §§ 1, 2, 48 Stat. 1064, 1064 (1934) (codified as amended at 28 U.S.C. §§ 2072–2074 (2006)).

<sup>527</sup> FED. R. CIV. P. 50(a) (1938).

<sup>528</sup> FED. R. CIV. P. 50(b).

<sup>529</sup> See *Balt. & Carolina Line, Inc. v. Redman*, 295 U.S. 654, 661 (1935); *Slocum v. N.Y. Life Ins. Co.*, 228 U.S. 364, 399–400 (1913); see also FED. R. CIV. P. 50 advisory committee's note to subdivision (b) (1937).

the jury.<sup>530</sup> The Advisory Committee's notes on the proposed amendment explained: "The practice, after the court has granted a motion for directed verdict, of requiring the jury to express assent to a verdict they did not reach by their own deliberations serves no useful purpose and may give offense to the members of the jury."<sup>531</sup> At the same time, the Committee proposed changing the title of subdivision (b) from "Reservation of Decision on Motion" to "Motion for Judgment Notwithstanding the verdict."<sup>532</sup> The Supreme Court approved the amendments. The pretense of jury involvement was falling away, and the Rules confirmed the open exercise of judicial power.

In 1991, amendments to Rule 50 went even further in this direction. In recommending major revisions to Rule 50(a), indeed merging it completely with 50(b) and re-entitling the entire rule "Judgment as a Matter of Law," the Advisory Committee proclaimed that the proposal "aims to facilitate the exercise by the court of its responsibility to assure the fidelity of its judgment to the controlling law, a responsibility imposed by the Due Process Clause of the Fifth Amendment."<sup>533</sup> The Fifth Amendment appeared to trump the Seventh. The Committee explained at length its decision to abandon the familiar term "directed verdict." The Committee called the term "misleading as a description of the relationship between judge and jury" and "freighted with anachronisms."<sup>534</sup> The term "judgment as a matter of law," the Committee explained, was almost equally familiar and appeared in Rule 56, concerning summary judgment.<sup>535</sup> Its use in Rule 50 highlighted the relationship between the two rules.<sup>536</sup> The revisions virtually expunged the jury from Rule 50, but by then it hardly mattered. Discovery, summary judgment, and settlement had become dominant: pretrial discovery revealed the facts formerly heard in evidence at trial, and summary judgment and settlement replaced jury verdicts. The Rules had facilitated the goal of virtually ending civil jury trials.

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<sup>530</sup> Amendments to Rules of Civil Procedure for the United States District Courts, 31 F.R.D. 587, 643 (1963) (proposing adding this sentence to the end of Rule 50(a): "The order of the court granting a motion for a directed verdict is effective without any assent of the jury.").

<sup>531</sup> *Id.* at 645.

<sup>532</sup> *Id.* at 643.

<sup>533</sup> FED. R. CIV. P. 50 advisory committee's note to subdivision (a) (1991). The Committee also recommended including in the rule the standard for judgment as a matter of law, which had not appeared previously but was found in case law: "a reasonable jury would not have a legally sufficient evidentiary basis to find for the party." *Id.*

<sup>534</sup> *Id.*

<sup>535</sup> *Id.*

<sup>536</sup> *Id.*

## CONCLUSION: THE CONSTANT EVOLUTION OF JURY PRACTICE

The explosion of new jury procedures in the late nineteenth and early twentieth centuries attest to the constant evolution of common law systems. The new procedures included majority verdicts,<sup>537</sup> juries of less than twelve,<sup>538</sup> jury trial only by request,<sup>539</sup> and limited summary judgment,<sup>540</sup> in addition to expanded use of directed verdict and judgment notwithstanding the verdict. The Federal Rules of Civil Procedure of 1938 introduced powerful mechanisms of pretrial discovery, drawn from equity, and summary judgment, a device for taking a case away from a jury altogether.<sup>541</sup> These new mechanisms have essentially rendered directed verdict, and indeed jury control generally, obsolete.<sup>542</sup> In the early twentieth century, well into the 1930s, legal periodicals regularly published articles and case notes about methods of jury control, especially directed verdict and judgment notwithstanding the verdict. Jury control was considered an important topic. The following decades, however, saw fewer and fewer mentions of the subject. American civil justice systems have moved far toward the goal, envisioned by the bolder reformers of the late nineteenth and early twentieth centuries, of abolition of the jury. The reformers hoped to substitute professional decisionmaking, an aim that was partly accomplished in summary judgment procedure.<sup>543</sup> Expanded use of directed verdict and judgment notwithstanding the verdict were important steps on the way.

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<sup>537</sup> WALTER F. DODD, *STATE GOVERNMENT* 308 (2d ed. 1923) (“Eighteen state constitutions now expressly provide for or permit a less than unanimous verdict in civil cases in courts of record. A number of these constitutions provide that a verdict may be rendered by three-fourths of the jury in civil cases.”).

<sup>538</sup> AUSTIN W. SCOTT, *FUNDAMENTALS OF PROCEDURE IN ACTIONS AT LAW* 77 n.19 (1922).

<sup>539</sup> CONN. GEN. STAT. §§ 2254, 5624 (1930); see Clark & Samenow, *supra* note 39, at 464, 467; Clark & Shulman, *supra* note 39, at 884 n.21.

<sup>540</sup> See *People’s Wayne Cnty. Bank v. Wolverine Box Co.*, 230 N.W. 170, 171 (Mich. 1930); *Gen. Inv. Co. v. Interborough Rapid Transit Co.*, 139 N.E. 216, 218 (N.Y. 1923).

<sup>541</sup> See FED. R. CIV. P. 26–37, 56 (1938).

<sup>542</sup> Scholars have observed that in some jurisdictions later in the twentieth century, courts had strict standards for directing a verdict. See, e.g., *Cohen v. Hallmark Cards, Inc.*, 382 N.E.2d 1145, 1148 (N.Y. 1978); Nelson, *supra* note 4, at 1191. By that time it was too late to make much difference. Civil jury trial was in a death spiral.

<sup>543</sup> Constitutional guaranties of civil jury trial remain an obstacle to full substitution of judicial decisionmaking for jury verdicts. As a result, the civil justice system has had to make do with pressuring litigants to settle. I address the history of interpretations of constitutional rights to civil jury trial, and the problem of constitutionalizing procedural rights, in a separate paper.