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THE POWER OF THE COURTS TO DIRECT A
VERDICT ON UNDISPUTED, UNCON-
TRADICTED ORAL TESTIMONY

The recent case of *Borough of Nanty-Glo v. Surety Company*¹ presents again the interesting problem over which the Pennsylvania Supreme Court and out-of-state authorities² have see-sawed for many years: i. e. when, if ever, will uncontradicted parol evidence warrant a directed verdict?

The facts, briefly, were these: The borough of Nanty-Glo brought suit for the default of its tax-collector whose faithful performance had been guaranteed by the defendant surety company. At the trial the tax-collector admitted his conversion of the funds. A clerk of the borough council testified that he had, in accordance with instructions from the borough council notified the insurance company of the default, by letter. Defendant offered no evidence tending to contradict the testimony of these two witnesses. The evidence, if true, warranted judgment for the plaintiff. Accordingly, the trial judge directed a verdict for the plaintiff.

Said the majority opinion:

"In granting the motion for binding instructions, the trial judge assumed the (oral) testimony to be true. This he had no right to do, even though it was uncontradicted. In the words of Justice Sharswood, 'However clear and indisputable may be the proof, when it depends upon oral testimony, it is nevertheless the province of the jury to decide, under the instructions of the Court, as to the law applicable to the facts, and subject to the salutary power of the Court to award a new trial if they should deem the verdict contrary to the weight of evidence'."

Justice Schaffer wrote a peppery dissent:

"The rule relied upon by the majority has behind it the idea that there is a clairvoyance in twelve minds when they sit in a jury box which enables them to

¹309 Pa. 236 (1932).

²8 A. L. R. 808 n; 72 A. L. R. 20 n.

know whether a witness is telling the truth or not. I can no more credit such a gift than I could that of fortune telling. I do not believe that when twelve heads are put together they radiate a power of divination in this respect superior to that in each individual cranium. . . In the ordinary affairs of life such statements (as those of the witnesses in this case) unchallenged would pass for verity. In my opinion they should in Court.

If the case had gone to the jury and they had found a verdict for defendant in the face of this testimony, the court would have been compelled to set the verdict aside since there would be no evidence to support it."

Justice Schaffer's opinion has considerable support in previous decisions. Perhaps the best statement is found in *Lonzer v. R. R.*³ by Justice Mitchell:

"When the testimony is not in itself improbable, is not at variance with any proved or admitted facts, or with ordinary experience, and comes from witnesses whose candor there is no ground for doubting, the jury is not at liberty to indulge in a capricious disbelief. If they do so, it is the duty of the court to set the verdict aside. * * * and when that is the case, the court may refuse to submit it at all and direct a verdict accordingly."

A number of cases before and since have subscribed to this view.⁴ There are also some decisions which, though apparently contradictory of the *Lonzer* case, are distinguishable. Thus, where there was evidence to the contrary,⁵ or where the facts were neither admitted nor clearly established by undisputed evidence,⁶ or where facts, though un-

³196 Pa. 610 (1900).

⁴*Campagna v. Ziskind* (1926) 287 Pa. 408; *Wolf v. Phila. Transit Co.* (1916) 252 Pa. 448; *Timlin v. American Patriots* (1915) 249 Pa. 469; *Waters v. Amer. Bridge Co.* (1902) 234 Pa. 7; *Dinan v. Supreme Council* (1904) 210 Pa. 456; *Mayor-Brum v. Ins. Co.* (1899) 189 Pa. 579; *Corcoran v. Life Ins. Co.* (1898) 183 Pa. 443; *Holland v. Kindregan* (1893) 155 Pa. 156; *St. Clair v. Hastings* (1920) 74 Pa. Super. Ct. 229.

⁵*Fry v. National Glass Co.* (1908) 219 Pa. 514; *Devlin v. Beacon Light Co.* (1901) 198 Pa. 583.

⁶*Vandevort v. Steel & Iron Co.* (1899) 194 Pa. 118.

contradicted, were testified to by an interested witness,⁷ clearly the *Lonzer* rule was inapplicable. In such cases there is ground for doubting the candor of the witnesses. Where a presumption has been established in favor of the plaintiff thus placing the burden of proof on the defendant, cases are in conflict as to whether clear and indisputable oral testimony rebutting the presumption would justify binding instructions for the defendant.⁸ That binding instructions are not proper might be upheld on the basis that the presumption itself amounts to legal evidence which it would not be capricious to believe.

On the other hand, there is previous authority for the *Nanty-Glo* case.⁹ That the two views are irreconcilable is well illustrated by two insurance cases. The facts were substantially the same: proof by uncontradicted, disinterested witnesses that the insured had made fraudulent representations in the application for a policy. Suit was by the beneficiary. Said Justice Finletter in *Mayor-Brum v. Insurance Co.*¹⁰:

"We find nothing in the testimony that would have justified the learned trial judge in submitting the case to the jury. There was no disputed question of fact for their consideration. It was conclusively shown by uncontroverted evidence that the plaintiff

⁷*Bank v. Hoffman* (1911) 229 Pa. 429.

⁸For Jury: *Shaugnessy v. R. R.* (1922) 274 Pa. 413; *Kreaner v. R. R.* (1906) 214 Pa. 219. For Court: (where evidence to the contrary is clear, positive and credible, and uncontradicted) *Unger v. R. R.* (1907) 217 Pa. 106; *Ely v. Pitts. R. Co.* (1893) 150 Pa. 233; *McIntyre v. Pittsburgh* (1913) 238 Pa. 524; *Magier v. Phila. R. R.* (1917) 257 Pa. 383; *Haskins v. R. R.* (1928) 293 Pa. 537; also the view of the great weight of authority, 66 A. L. R. 1536 and cases there cited.

⁹*Hartig v. Amer. Ice Co.* (1927) 290 Pa. 21; *Holzheimer v. Lit Brothers* (1918) 262 Pa. 150; *Nydes v. Royal Neighbors* (1917) 256 Pa. 381; *Newman v. Romanelli* (1914) 244 Pa. 142; *Carter v. Henderson* (1909) 224 Pa. 319; *Bartlett v. Rothschild* (1906) 214 Pa. 421; *Grambs v. Lynch* (1884) 20 WNC 376; *Lamb v. Irwin* (1871) 69 Pa. 436; *Harlow & Co. v. Homestead* (1899) 194 Pa. 57; *Reel v. Elder* (1869) 62 Pa. 308; *Lautner v. Kann* (1898) 184 Pa. 344; *Coal Co. v. Evans* (1896) 176 Pa. 28; *Bank v. Donaldson* (1847) 6 Pa. 179.

¹⁰189 Pa. 579 (1899).

was not entitled to recover in the suit and a directed verdict was proper."

Justice Stewart in *Nydes v. Royal Neighbors*:¹¹

"However clear and indisputable may be the proof, when it depends on oral testimony, it is nevertheless the province of the jury to decide. . . ."

Hence, the question arises as to which view should be adopted. Some support in favor of submitting such cases to the jury may be found from fear that while the testimony may appear indisputable on the record, the demeanor of the witness might furnish doubts as to his credibility. That argument would be equally strong against allowing the court to set aside a verdict contrary to the weight of the evidence, a power that is unquestioned.¹² If the Court has power to set aside a verdict it is difficult to see why it should not be given power to compel a proper verdict in the first place. There is no greater danger attending the one than the other. True, it is the province of the jury to decide facts and the courts should not invade the jury's domain. Far from upholding the jury, however, such procedure brings it into disrepute. It amounts to this: the court says to the jury: "It is your province to decide this case, but if you fail to decide it correctly, another jury will be called to arrive at a correct decision." And suppose the second jury makes the same mistake? Are the parties to be forced to litigate until a jury is found that will give a proper verdict?

Carried to its ultimate conclusion the decision in the *Nanty-Glo* case would bring strange results. Since almost all evidence is oral and all oral testimony must go to the jury to have its credibility tested, a directed verdict would be virtually impossible except where plaintiff has failed to make out a cause of action, or where either party admits the facts on which the law defeats him. The incontrovert-

¹¹256 Pa. 381 (1917).

¹²*Borough of Nanty-Glo v. Insurance Co.* (1932) 309 Pa. 236; *Maloy v. Rosenbaum* (1918) 260 Pa. 422; *Dinan v. Supreme Council* (1904) 210 Pa. 460.

ible physical facts rule has been broadly applied in Pennsylvania,¹³ but since a witness must present the facts on which the mathematical calculations are based or verify the photograph or map, the case must go to the jury to decide if the witness is telling the truth. Though plaintiff in a suit may establish a prima facie case, a defendant who does nothing to meet the burden of proof may demand that the case go to the jury for determination of the credibility of the witnesses who testified to the facts creating the prima facie case.

The application of the rule laid down in the *Lonzer* case, if left to the discretion of the trial judge whose decision would not be overthrown except for clear abuse, would avoid inconsistency. Where essential facts are testified to by an interested witness, there is some doubt as to the witness's candor, and the case could properly be said to be one for the jury. Even the *Nanty-Glo* case could be thus distinguished.¹⁴ It is safe to say, in any event, that the courts are unlikely to follow the broad rule laid down by the majority opinion to its full implication.

Spencer R. Liverant

¹³See 36 D. L. R. 58, November 1932.

¹⁴In the *Nanty-Glo* case, *supra*, an essential fact to be established was the giving of notice to the insurance company. A clerk of the plaintiff testified to this fact. Clearly such a witness would be interested in the outcome.