claims more quickly. Secondly, proceedings on motion allow the court to definitely retain jurisdiction over the parties.[248]

It is suggested that the above recommendations would result in a more effective and clearer procedure of attacking judgments. Consolidation especially would have an advantageous effect. It would benefit both judgment holders and applicants in clarifying the law. Consolidation would restrict ill-defined causes of action, thereby protecting finality, and would afford clear relief to claimants who have set out meritorious causes.

THE MOTION FOR A DIRECTED VERDICT IN INDIANA: AN EVALUATION OF PRESENT STANDARDS

A motion for a directed verdict, properly viewed, tests the legal sufficiency of the evidence to sustain each of the ultimate propositions which collectively constitute the cause of action or defense that the proponent has asserted.[1] A proponent attempts to prove these ultimate

248. By requiring a complaint, the court must again obtain jurisdiction over the parties before it can proceed with the hearing. This might prove difficult in some cases. For example, where one who prevailed in the original cause has left the state or where he was a non-resident and sued in an Indiana court, the applicant who has a valid cause for relief might be defeated on jurisdictional grounds. Gavit contends that jurisdiction may be obtained by publication in these situations, the action being in rem with the judgment the res. 2 GAVIT, INDIANA PLEADING AND PRACTICE § 216(c) (1942). This reasoning is supported in Padol v. Home Bank and Trust Co., 108 Ind. App. 401, 27 N.E.2d 917 (1940). This case allowed notice by publication in an action under Burns 2-1068, but the question was not raised or discussed by the court.

1. "Our procedure and practice do not recognize the right of a defendant to require the withdrawal of a case from the jury by a motion for a nonsuit." Diamond Block Coal Co. v. Edmonson, 14 Ind. App. 594, 595, 43 N.E. 242, 243 (1896); City of Plymouth v. Milner, 117 Ind. 324, 20 N.E. 235 (1888). But if the defendant seeks to make an attack upon the evidence supporting one of several allegations in a complaint, the proper procedure is to request the court to withdraw that issue from the consideration of the jury, rather than to request a directed verdict. In New York Cent. R.R. Co. v. Verkins, 125 Ind. App. 320, 122 N.E.2d 141 (1954), the plaintiff alleged that the defendant was negligent in three particulars; high and dangerous rate of speed, failure to give a warning, and failure to keep a lookout. The defendant tendered what appears to be a peremptory instruction in his favor on the later allegation, but the Appellate court treated the instruction as one to withdraw the issue from the jury and held that it was error for the trial court to refuse this motion when there was no evidence to support the issue. See Johnson v. Estate of Gaugh, 125 Ind. App. 510, 124 N.E.2d 704 (1955). If the paragraphs of the complaint state different causes of action, the proper motion to attack one paragraph is the request for a directed verdict. Hamling v. Hildebrandt, 119 Ind. App. 22, 81 N.E.2d 603 (1948); Chicago, S.S. & S.B. R.R. Co. v. Pacheco, 94 Ind. App. 353, 181 N.E. 7 (1932).

Evidence is not categorically divided or compartmentalized into the ultimate propositions that such evidence is adduced to prove. Chacker v. Marcus, 119 Ind. App. 672, 86 N.E.2d 708 (1949). In determining whether the ultimate propostions have been

propositions in order to obtain a favorable verdict.[2] This verdict must be reasonable, both in fact and law,[3] and the trial judge must exercise the proper judicial function of preventing unreasonable verdicts.[4] Evidence that presents no reasonable factual or inferential basis through which the truth of each ultimate proposition can be established is legally insufficient.[5] Such evidence could only support an unreasonable, judicially preventable, verdict. It must be determined under what state of the evidence the trial judge may say, as matter of law, that a finding of these ultimate propositions would be unreasonable. If such a finding can be made, a requested directed verdict is properly granted.

The trial court judge "should not direct a verdict unless there is a total lack of evidence on some essential issue."[6] A total absence of evidence is ambiguous as a standard for it may be construed by the trial judge to mean either a literal absence of evidence or a legal absence of evidence. This ambiguity imposes no serious consequences in terms of the case result because a finding of either would enable the trial judge

established, it matters not which party introduces the evidence. Fetter v. Powers, 118 Ind. App. 367, 78 N.E.2d 555 (1948). The defendant having unsuccessfully challenged the sufficiency of the plaintiff's presentation of evidence to support a prima facie case, may, by proceeding with his own evidence rather than resting, be subjected to the risk of fulfilling an undetected defect in the plaintiff's case.

2. The term "proponent" is used herein to denote the party bearing the burden of proof, both as to going forward with evidence and the risk of non-persuasion. Although the plaintiff will be the proponent in most cases, the possibility of both burdens resting upon the defendant should not be excluded. For example, the defendant will be the proponent when an affirmative defense is pleaded. See note 35 *infra* and surrounding text.

3. Enmeshed in the question of the propriety of a directed verdict in a given evidentiary situation is the problem of distinguishing and separating questions of law from questions of fact. It is established that questions of fact are for the jury, and if such a question of fact is found to exist, a directed verdict is improper. In the absence of a question of fact, leaving only questions of law, a directed verdict may or may not be proper, depending upon the evidentiary situation presented. Kempf v. Himsel, 121 Ind. App. 488, 98 N.E.2d 200 (1951); Prudential Ins. Co. v. Robbins, 110 Ind. App. 172, 38 N.E.2d 274 (1941). See Thayer, *"Law and Fact" in Jury Trials*, 4 HARV. L. REV. 147 (1890); Bohlen, *Mixed Questions of Law and Fact*, 72 U. PA. L. REV. 111 (1923).

4. Both court and jury have struggled for control of the verdict since the inception of the jury system. Initially the jury held complete control over the verdict, for its members were selected on the basis of prior knowledge of the incidents which resulted in the litigation. Court control of the verdict has been manifested in the many devices of attaint, the fining of jurors, the requirement that facts be found from evidence adduced in open court, the demurrer to the evidence, the directed verdict, and the judgment notwithstanding the verdict. This evolution is definitively traced in THAYER, A PRELIMINARY TREATISE ON EVIDENCE c.c. I-V (1898). A more concise historical survey may be found in Smith, *The Power of a Judge to Direct a Verdict: Section 457-a of the New York Civil Practice Act*, 24 COLUM. L. REV. 111 (1924).

5. Faris v. Hoberg, 134 Ind. 269, 33 N.E. 1028 (1892); Thayer, *supra* note 3, at 153.

6. Kandea v. Inland Amusement Co., 220 Ind. 219, 224, 41 N.E.2d 795, 797 (1942); Bell v. Bell, 108 Ind. App. 436, 29 N.E.2d 358 (1940); Kettner v. Jay, 107 Ind. App. 643, 26 N.E.2d 546 (1939); Estes v. Anderson Oil Co., 93 Ind. App. 365, 176 N.E. 560 (1931).

properly to direct a verdict. However, to find a literal absence of evidence imposes upon the trial judge a duty that differs from that required in finding a legal absence of evidence. The former would require the court to make but a summary examination to ascertain whether all of the ultimate propositions have been covered by the presentation of evidence. In a case where the law requires that a document be signed by two witnesses, X and Y, and the evidence demonstrates that only Y signed, no mention being made of X, the proponent must suffer an adverse verdict due to this quantitative defect in proof. Such a quantitative defect in proof represents a literal absence of evidence upon the ultimate proposition. The Indiana courts have not distinguished this situation from a case in which there is some evidence that both X and Y did sign; but there remains a question as to the quality of the evidence asserted to establish that Y did, in fact, sign. When there is a qualitative defect in the evidence, a verdict is properly directed against the proponent, for any verdict in favor of the proponent would be insufficient in law. Under this analysis, language used by the court in asserting that a directed verdict is proper *only* when there is a total lack of evidence upon some essential issue loses its restrictive character because a verdict may be directed both where there is a literal absence of evidence and where there is some evidence which, although tending to establish the ultimate propositions in issue, fails to satisfy the qualitative standard.[7]

The trial court must test the evidence by some qualitative standard in order to determine if there is such a legal absence of evidence as to entitle the movant to a directed verdict.[8] In defining this requisite evidentiary quality, the Indiana courts have engaged in a wide variety of language which, at best, has left the standard uncertain. The older *scintilla* rule required the trial judge to submit the case to the jury if there was even the slightest quantum of evidence introduced to sustain

7. Although this restrictive language has been used, the Indiana courts appear to prefer a broader statement of the rule. "It is only where there is a total absence of evidence upon some essential issue, *or* where there is no conflict and the evidence is susceptible of but one interfence and that against the party having the burden, that a peremptory instruction should be given." Boston v. Chesapeake & Ohio R.R. Co., 223 Ind. 425, 428, 61 N.E.2d 326, 327 (1945); Whitaker v. Borntrager, 233 Ind. 678, 122 N.E.2d 734 (1954); Callahan v. New York Cent. R.R. Co., 125 Ind. App. 631, 125 N.E.2d 263 (1955); Johnson v. Estate of Gaugh, 125 Ind. App. 510, 124 N.E.2d 704 (1955); Boyd v. Hodson, 117 Ind. App. 296, 72 N.E.2d 46 (1946).

8. The term "movant" is used herein to indicate the party requesting a direction of the verdict in his favor. Although the defendant will be the movant in most directed verdict situations, the possibility that the movant may also be either a plaintiff or a proponent should not be excluded when considering whether a directed verdict is proper in a given case.

the ultimate propositions.[9] The rule clearly has been abandoned in Indiana.[10] However, the term *scintilla* is still used by the Indiana court in a negative sense. Such use amounts to a statement of the result that, after a judicial evaluation of the evidence, there remains a legal absence of evidence and a verdict is properly directed, but this usage falls far short of providing a firm qualitative yardstick to be used in measuring the evidence. Something more than a *scintilla* of evidence is necessary to preclude a directed verdict.[11]

The court has utilized a long line of somewhat less than definitive words as substitutes for the *scintilla* rule, but their adoption has failed to establish a clear qualitative standard. The trial judge should not leave the finding of the ultimate proposition to "speculation, surmise, or conjecture,"[12] nor is evidence which is "merely the conclusion of a witness"[13] sufficient to satisfy the qualitative requirement. In order to preclude a directed verdict, there must be some competent evidence upon each material element of the cause of action;[14] there must be "substantial evidence . . . it must be evidence which has probative value;"[15] or there must be a "legitimate inference from the evidence tending to support the appellant's [plaintiff's] right to recover."[16] A directed verdict is also improper when honest jurors might, by reasonable inference from the evidence adduced, conclude the ultimate proposition,[17] or when "reasonable men might differ as to whether plaintiff, by his evidence, has made a prima facie case."[18] Such evidence may be weak, for "the weight, convincing nature, extent, and value thereof is for the jury."[19] Such semantic wandering by the judiciary does little to clarify the evidentiary standard. But a line somewhere in this list of adjectives divides those cases in which the trial judge must say that there is a legal absence of evidence, from those cases in which the minimum "weak" evidence has

9. Company of Carpenters v. Hayward, 1 Doug. 374, 99 Eng. Rep. 241 (K.B. 1780). In Toomey v. London Ry. Co., 3 C.B. N.S. 146, 140 Eng. Rep. 694 (C.B. 1857), the *scintilla* rule was discarded, and was replaced by a requirement that there must be evidence upon which the jury might reasonably conclude the ultimate propositions.

10. Dunnington v. Syfers, 157 Ind. 458, 62 N.E. 29 (1901).

11. Gewartowski v. Tomal, 125 Ind. App. 481, 123 N.E.2d 580 (1955).

12. Hummel v. New York Cent. R.R. Co., 117 Ind. App. 22, 26, 66 N.E.2d 901, 902 (1946); Orey v. Mutual Life Ins. Co., 215 Ind. 305, 19 N.E.2d 547 (1939).

13. New York Cent. R.R. Co. v. Verkins, 125 Ind. App. 320, 322, 122 N.E.2d 141, 142 (1954).

14. Diezi v. Hammond Co., 156 Ind. 583, 60 N.E. 353 (1900).

15. Hummel v. New York Cent. R.R. Co., 117 Ind. App. 22, 25, 66 N.E.2d 901, 902 (1946).

16. Gasco v. Tracas, 85 Ind. App. 591, 594, 155 N.E. 179, 180 (1926).

17. Tarnowski v. Lake Shore & M.S. R.R. Co., 181 Ind. 202, 104 N.E. 16 (1913).

18. Kostial v. Aero Mayflower Transit Co., 119 Ind. App. 377, 378, 85 N.E.2d 644, 644 (1949).

19. Johnson v. Estate of Gaugh, 125 Ind. App. 510, 519, 124 N.E.2d 704, 708 (1955).

been attained. Justice Rutledge drew an analogy between this line and the one that divides substance from shadow, "impossible to draw by magic of word or formula, . . . and always relevant to the issues and the evidence in a particular case."[20] The reversal of many directed verdict cases indicates that the Indiana courts have failed to give trial judges an adequate framework to be used in ruling on the motion.[21]

When ruling upon the now outmoded demurrer to the evidence, the trial judge was constrained to totally disregard evidence which favored the demurrant. The demurrant was deemed to have admitted the truth of the proponent's evidence and the reasonable inferences which could be drawn therefrom.[22] Hence there was neither a conflict as to credibility of witnesses nor a contradiction of the evidence favorable to the proponent that would raise an issue of fact for jury determination. Evidence favorable to the demurrant simply was not considered. The replacement of the demurrer to the evidence by the directed verdict as a weapon of evidentiary attack was caused chiefly by inherent procedural disadvantages in the demurrer to the evidence.[23] But judicial confusion has resulted in the motions being treated as equivalents.[24] This confusion appears in cases which adopt the rule that when there is a conflict in the evidence, evidence that favors the movant is deemed to be withdrawn.[25] The deemed to be withdrawn rule was utilized in *Hamble v.*

20. Christie v. Callahan, 124 F.2d 825, 827 (D.C. Cir. 1941).

21. *E.g.*, Whitaker v. Borntrager, 233 Ind. 678, 122 N.E.2d 734 (1954); Brandenburg v. Buchta, 233 Ind. 221, 117 N.E.2d 643 (1953); Johnson v. Estate of Gaugh, 125 Ind. App. 510, 124 N.E.2d 704 (1955); Callahan v. New York Cent. R.R. Co., 125 Ind. App. 631, 125 N.E.2d 263 (1955); Kostial v. Aero Mayflower Transit Co., 119 Ind. App. 377, 85 N.E.2d 644 (1949).

22. Fritz v. Clark, 80 Ind. 591 (1881).

23. Upon a demurrer to the evidence, the demurrant was constrained to admit in writing not only the veracity of evidence favorable to the opponent but also all facts which that evidence tended reasonably to prove. Overruling the demurrer foreclosed the demurrant's opportunity to present evidence in defense and judgment was rendered in favor of the opponent. See Smith, *supra* note 4 at 113. A motion for a directed verdict, overruled at the close of the proponent's case, does not preclude the movant's right to proceed with his own evidence, but, by proceeding, the movant waives any error which the court may have made in ruling upon the motion. Long v. Archer, 221 Ind. 186, 46 N.E.2d 818 (1943).

24. "When a demurrer to the evidence would be sustained, the court may instruct the jury to find against the plaintiff. . . . The direction of verdicts superseded demurrers to evidence, and is governed by the same rules." Jacobs v. Jolley, 29 Ind. App. 25, 38, 62 N.E. 1028, 1032 (1901). Further evidence of the confusion of the two motions is found in Boyd v. Hodson, 117 Ind. App. 296, 72 N.E.2d 46 (1946), wherein the court held that, on motion for a directed verdict, the movant admitted the truth of all competent evidence tending to prove the proponent's case and all reasonable inferences deducible therefrom. See Estes v. Anderson Oil Co., 93 Ind. App. 365, 176 N.E. 560 (1931).

25. Kandea v. Inland Amusement Co., 220 Ind. 219, 41 N.E.2d 795 (1942); Bell v. Bell, 108 Ind. App. 436, 29 N.E.2d 358 (1940); Kettner v. Jay, 107 Ind. App. 643, 26 N.E.2d 546 (1939); Estes v. Anderson Oil Co., 93 Ind. App. 365, 176 N.E. 560 (1931).

Brandt[26] where the plaintiff sought recovery for the loss of his wife's services. She sustained injuries as a result of the alleged negligence of the defendant's servant in allowing a brick to fall upon her from overhead construction work in which the defendant was engaged. The plaintiff, his son, and the physician who treated the wife testified as to the date of the occurrence of the accident. The plaintiff and his son testified that it occurred on December 8, while the physician placed the date as on or about December 8. There was also evidence that the contractor defendant commenced the work on December 1, and that the work was completed and the premises vacated by the defendant on December 6. The trial court granted defendant's motion for a directed verdict at the close of all of the evidence. Although this action was affirmed on appeal on the basis that the doctrine of res ipsa loquitur was not applicable due to the plaintiff's failure to prove that the instrumentality was in the exclusive control of the defendant, the court also held that the evidence of the beginning and completion dates of the work "could not be rightfully considered by the trial court [in determining whether there was evidence from which the jury might have reasonably concluded that the injury was caused by the defendant's negligence] because not favorable to appellant [plaintiff]."[27] Such a "deemed to be withdrawn" rule sounds in demurrer to the evidence because the essence of this motion is a voluntary eradication of conflict. On the other hand, conflict in evidence sounds in directed verdict, for the movant may or may not desire to admit the veracity of evidence favorable to the proponent. In addition, and of more importance, the modern movant wishes evidence favorable to his cause to do equal duty with that which favors the proponent. But the "deemed to be wtihdrawn" rule requires the trial judge to determine the qualitative sufficiency of the proponent's case without regard to the quality of evidence favorable to the movant. In terms of consequences, the rule generally leaves the trial judge with only the power of setting aside an unreasonable verdict and granting a new trial. Litigation is prolonged, costs are increased, and the judicial power of preventing unreasonable verdicts is weakened. Fortunately, this extremely narrow view of the mission of evidence favorable to the movant has not enjoyed complete acceptance in the Indiana courts, but in light of the fact that the cases in which it has been adopted have never been overruled, a word of caution is provided for the prospective movant.

A plurality of the Indiana cases have digressed from the extreme view stated above by adopting the rule that the trial judge must consider

26. 98 Ind. App. 399, 189 N.E. 533 (1933).
27. *Id.* at 403, 189 N.E. at 535.

only the evidence and inferences reasonably deducible therefrom which favor the proponent.[28] A failure of these cases to mention the "deemed to be withdrawn" rule leads, by implication, to the conclusion that evidence favorable to the movant is and should be considered in determining what evidence and inferences can legally favor the proponent. In *Hummel v. New York Central R. Co.*,[29] an action was brought under the wrongful death statute against a railroad for injuries sustained through the negligence of the railroad's servant in failing to blow a warning whistle when approaching a crossing. The plaintiff called two witnesses. The first was the engineer who testified that the whistle was blowing at the crossing and that it had been blowing since the train left Indianapolis. The plaintiff's other witness was a woman who had lived very near the crossing for thirty years. She testified "that she did not hear the whistle; she never heard the whistle, she had gotten accustomed to trains and never noticed them; she was accustomed to it and she never noticed this train whistle; it could have whistled; she did not mean to say it didn't whistle; it could have whistled because she just didn't notice them."[30] The trial court, on its own motion, directed a verdict for the defendant at the close of the plaintiff's case. The Indiana Appellate court affirmed this decision. As evidence, the witness' statement that "she did not hear the whistle" was favorable to the plaintiff, and, taken alone, would support the negative inference that the whistle was not blown. Her further statement as to why she didn't hear the whistle is evidence which favors the defendant, and one from which it is reasonably inferrable that the whistle was blown. But, when all of her testimony is examined, the drawing of the negative inference favoring the plaintiff becomes unreasonable, or as the court said, "a finding that the whistle was not blown could be the result only of speculation, surmise and conjecture."[31] The decision in the *Hummel* case would have been an improper one if the court had utilized the "deemed to be withdrawn" rule. The witness' statement that she did not hear the whistle would have been considered without regard to the qualifying evidence favorable to the movant, and as such, could have reasonably supported the inference that the whistle was not blown.

28. *E.g.*, Whitaker v. Borntrager, 233 Ind. 678, 122 N.E.2d 734 (1954); Orey v. Mutual Life Ins. Co., 215 Ind. 305, 19 N.E.2d 547 (1939); Johnson v. Estate of Gaugh, 125 Ind. App. 510, 124 N.E.2d 704 (1955); Niegos v. Indiana Harbor Belt R.R. Co., 124 Ind. App. 430, 116 N.E.2d 550 (1953); Holtz v. Elgin, J. & E. R.R. Co., 121 Ind. App. 175, 98 N.E.2d 245 (1950); Kostial v. Aero Mayflower Transit Co., 119 Ind. App. 377, 85 N.E.2d 644 (1949); State *ex rel.* Thompson v. City of Greencastle, 111 Ind. App. 640, 40 N.E.2d 388 (1942).

29. 117 Ind. App. 22, 66 N.E.2d 901 (1946).

30. *Id.* at 25, 66 N.E.2d at 902.

31. *Id.* at 26, 66 N.E.2d at 902.

The reasonable inference rule allows trial judges to exert proper control over the jury and verdict by subjecting all of the evidence to a test of reasonableness. Utilization of this control may be manifested in one of two ways. First, the court may subjectively disregard evidence favorable to the movant and make a temporary assumption of the truth of evidence favorable to the proponent and reasonable inferences deducible therefrom. Under this assumption, the court must determine whether this evidence brings the proponent within the protection of the substantive rule of law relied on to establish either liability or a valid defense. If the evidence favorable to the proponent fails to bring the case within the protection of the substantive rule, a verdict should be directed for the movant, for to allow the jury to return a verdict for the proponent would be to allow the jury to establish a new substantive rule of law imposing liability upon the movant. Judicial control over the rules fixing legal liability would be abolished. In *Chacker v. Marcus*[32] the plaintiff brought an action against his partner and an employed bookkeeper for the alleged misappropriation of restaurant business receipts. There was evidence that the profits fluctuated between the time that the defendant partner was in exclusive control of the cash register and the time when the cash register was in the exclusive control of other partners. The plaintiff made inquiry of both defendants as to these fluctuations, and was told: "Don't worry, we are doing business okay. Everything will be taken care of." There was also undisputed evidence that certain bookkeeping entries were made by the employee for the purpose of avoiding payment of taxes. At the close of the plaintiff's evidence, the trial court directed a verdict in favor of both defendants. In affirming this direction, the Indiana Appellate court said: "It seems to us that a fair consideration of all of the evidence in the light of the appellant's [plaintiff's] contentions, present a situation in which the appellant [plaintiff] asks this court to establish a rule that when one partner is in charge of a business and the business makes less profit than when other partners were in exclusive charge of it, that such evidence together with reassuring oral reports of the condition of the business . . ., would be sufficient to justify a reasonable inference that such partner is guilty of misappropriation of funds. As a matter of law, it cannot be said that embezzlement or misappropriation of funds can be established from a mere showing of a fluctuation of profits alone . . ."[33]

This "preliminary assumption of truth" test is equally applicable in negligence cases where the issue is whether the defendant has complied

32. 119 Ind. App. 672, 86 N.E.2d 708 (1949).
33. *Id.* at 677, 86 N.E.2d at 710.

with the standard of care. "When, during the trial, the court is called upon to instruct the jury, there is . . . but one limitation upon the duty to charge that a given state of facts, if found by the jury to exist, does or does not authorize the finding of negligence, and that exception is where the facts, clearly established, are such that one man, impartial and of good judgment, might reasonably infer that negligence existed, while another man, equally sensible and impartial, might reasonably infer that proper care had been used. Upon such facts it is the province of the jury to adjudge the existence or nonexistence of negligence."[34] Although the trial judge's statutory power to grant a new trial is an effective device for the prevention of substantive change by means of a jury verdict, the power does not afford adequate protection to the movant because such a movant is forced to suffer the time and expense of a new trial in order to establish his freedom from liability.

By making this preliminary assumption of truth, the court subjectively eradicates from its consideration all evidence favorable to the movant, forcing the movant to admit facts and inferences reasonably deducible therefrom that evidence favorable to the proponent tends to prove. As a result, there can be no factual conflict requiring jury reconciliation. Credibility of witnesses is not in issue. The application of the test in the usual case in which the movant does not bear the burden of any issue will not operate adversely to either party's interest in having conflicts and credibility passed upon by the jury. To direct a verdict in favor of the movant neither coerces a disbelief of oral testimony favorable to the proponent nor demands that conflict be reconciled favorable to the movant. The jury may believe or disbelieve as it sees fit and may resolve any conflict for one party or the other, but a quantitative or qualitative defect may still exist in the proponent's case. But the "preliminary assumption of truth" test must not be applied in cases in which the same party is both the movant and the proponent. A verdict may never be properly directed in favor of such a "proponent-movant" where the determination of the question depends upon conflicting testimony or the credibility of witnesses[35] for such a direction would demand that

34. Faris v. Hoberg, 134 Ind. 269, 272, 33 N.E. 1028, 1028 (1892). "The court determines, first, whether if the facts are true, the plaintiff is entitled to recover. While this judicial function is generally invoked in passing upon the sufficiency of pleadings, it often arises again upon the evidence, and where the evidence most favorable to the plaintiff is insufficient to establish negligence in law, the court should dispose of the matter and not permit the question to go to the jury." New York Cent. R.R. Co. v. Powell, 221 Ind. 321, 331, 47 N.E.2d 615, 619 (1943). See HARPER AND JAMES, TORTS c. 15 (1956); GREEN, RATIONALE OF PROXIMATE CAUSE c. 4 § 2 (1927).

35. This rule applies to both the direction of a verdict in favor of the plaintiff as to the issue of the defendant's negligence and to the direction of a verdict in favor of the defendant as to the plaintiff's contributory negligence. Heiny v. Pennsylvania

material conflicts be reconciled in favor of the proponent or would coerce a belief of oral testimony favorable to the proponent.[36]

Although the "deemed to be withdrawn" rule has not enjoyed appreciable favor in the Indiana courts, it appears to have properly remained to fulfill a necessary function in the first reasonableness test under the rule that permits the court to consider only evidence and inferences reasonably deducible therefrom which favor the proponent. Even if the evidence in a case is undisputed, different inferences may or may not flow therefrom. If there are conflicting inferences, a preliminary judicial control in terms of the reasonableness of these conflicting inferences must be exercised if the jury is to be confined within acceptable limits of legal liability.[37] This "undisputed evidence-controlled inference" theory has been the basis of a proper directed verdict in negligence actions in which the court has held that the movant's conduct was not the proximate cause of the proponent's injuries;[38] that the movant

R.R. Co., 221 Ind. 367, 47 N.E.2d 145 (1942). This rule was erroneously stated in State v. Robbins, 221 Ind. 125, 46 N.E.2d 691 (1943), where the trial court directed a verdict in favor of the defendant at the close of the state's case. In reversing this decision, the Indiana Supreme court said: "Whether the state had proven its case, after this testimony was in, depended upon whether the jury would give credence to the testimony. Where a determination of the issue involves the credibility of witnesses, it is an invasion of the province of the jury for the court to direct a verdict." *Id.* at 135, 46 N.E.2d at 694. This statement of the rule is accurate if its scope is limited to the proponent. As stated, the rule is erroneous for a defect in proof may be found whether the jury believes or disbelieves the testimony in question. For an excellent analysis of the various approaches that have been taken to the rule which prohibits the direction of a verdict in favor of the proponent see Sunderland, *Directing a Verdict for the Party Having the Burden of Proof,* 11 MICH. L. REV. 198 (1912).

36. Such a forced reconciliation of conflict or coercion of belief is not present when the evidence is documentary in nature. The reason for the rule therefore disappears, and it is permissable to direct a verdict in favor of the proponent in such cases. Modern Woodmen of America v. Jones, 52 Ind. App. 149, 98 N.E. 1006 (1912); Fowler Utilities Co. v. Chaffin Coal Co., 43 Ind. App. 438, 87 N.E. 689 (1908).

37. "Where there is no dispute as to the facts, and no controversy as to the inferences that can be legitimately drawn from them, the question is one of law, and the court may rightfully take the case from the jury." Purcell v. English, 86 Ind. 34, 35 (1882).

38. In Slinkard v. Babb, 125 Ind. App. 76, 112 N.E.2d 876 (1954), the facts were undisputed. The court held, as a matter of law, that the only reasonable inference deducible from the facts was that the chain of causation had been broken by an intervening force which could not have been anticipated. The trial court directed verdict was affirmed on that basis. A motion to transfer to the Indiana Supreme court was denied without opinion. Slinkard v. Babb, 233 Ind. 633, 122 N.E.2d 463 (1954). Judge Emmert, writing a dissenting opinion on the motion to transfer, would have reversed the trial court's direction of the verdict in favor of the defendant on the grounds that, as proximate cause is to be based upon foreseeability, it was for the jury to say whether the intervening force was foreseeable. If such a force was foreseeable the defendant's conduct was the proximate cause of the plaintiff's injuries. Support for Judge Emmert's position is found in McIntosh v. Pennsylvania R.R. Co., 111 Ind. App. 550, 38 N.E.2d 263 (1941), where the court, dealing with undisputed facts, reversed a trial court directed verdict in favor of the defendant. "We think that under proper instructions the jury was entitled under all of the evidence to reach its own conclusion as to whether or not it might reasonably be anticipated and foreseen that such a collision . . . might

owed the proponent no duty of care;[39] or where the plaintiff was contributorily negligent as matter of law.[40] The approach has also been used by the court to prevent recovery in actions of agency,[41] conversion,[42] landlord-tenant,[43] contract,[44] and malicious prosecution.[45]

A verdict may be properly directed for the movant by application of the first reasonableness test alone in two situations: first, conceding that there is a conflict in the evidence, when that evidence favorable to the proponent fails to bring his case within the protection of the rule of law asserted; and, secondly, when there is no conflict in the evidence and there can be no reasonable inference drawn therefrom which will bring the proponent within the protection of the rule of law asserted.

But when the proponent has, by evidence or inference therefrom, successfully brought his case within the protection of the rule of law under the first reasonableness test, the court must apply a second test of reasonableness to the evidence. Here the court must vitiate the assumption of truth and, in light of *all* the evidence, must determine what quantum and quality of evidence reasonably remains to support the ultimate propositions which the proponent has asserted. As in the *Hummel* case, evidence favorable to the movant must be considered in order that the court may make an accurate qualitative appraisal of the evidence in terms of reasonableness. By subjecting all of the evidence to this dual-reasonableness test, the court is merely exercising the well-recognized power of deciding whether or not the ultimate propositions *can* be inferred by the

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occur . . ., and whether or not it might reasonably be anticipated and foreseen that if such collision did occur that flying parts of the demolished automobile might do injury to the travelling public as a class. . . ." *Id.* at 562, 38 N.E.2d at 267. See Phares v. Carr, 122 Ind. App. 597, 106 N.E.2d 242 (1952); Holtz v. Elgin, J. & E. R.R. Co., 121 Ind. App. 175, 98 N.E.2d 245 (1950); Smith v. Feerer, 117 Ind. App. 304, 70 N.E.2d 770 (1946).

39. Faris v. Hoberg, 134 Ind. 269, 33 N.E. 1028 (1892); Niegos v. Indiana Harbor Belt R.R. Co., 124 Ind. App. 430, 116 N.E.2d 550 (1954).

40. These cases require a direction in favor of the proponent-movant, for the defendant bears the burden of the issue of the plaintiff's contributory negligence. Such a direction has been held proper only in cases in which the plaintiff's presentation of evidence demonstrates his own negligence. The theory is apparently that it would be unreasonable to disbelieve the testimony of the plaintiff and his witnesses. Pittsburgh, C., C., & St. L. R.R .Co. v. Sievers, 162 Ind. 234, 70 N.E. 133 (1903); Day v. Cleveland, C., C., & St. L. R.R. Co., 137 Ind. 206, 36 N.E. 854 (1893). These cases would be improper under a "deemed to be withdrawn" rule for such testimony offered by the plaintiff would favor the proponent-movant and would have to be disregarded in ruling on the motion for a directed verdict.

41. Wagner v. Howard Sober, Inc., 119 Ind. App. 617, 86 N.E.2d 719 (1949); Cates v. Long, 117 Ind. App. 444, 72 N.E.2d 233 (1946).

42. Chacker v. Marcus, 119 Ind. App. 672, 86 N.E.2d 708 (1949).

43. Purcell v. English, 86 Ind. 34 (1882).

44. Taylor v. Altgelt, 224 Ind. 383, 67 N.E.2d 531 (1946); Fowler Utilities Co. v. Chaffin Coal Co., 43 Ind. App. 438, 87 N.E. 689 (1908).

45. Boyd v. Hodson, 117 Ind. App. 296, 72 N.E.2d 46 (1946).

jury. An affirmative finding upon both phases of the test raises a question for the jury as to whether or not the ultimate propositions *should* be inferred.[46]

The Indiana courts quite properly have made it clear that weighing the evidence prior to a verdict is a jury function.[47] Inquiry should be made to determine whether the second phase of the dual-reasonableness test improperly grants this pre-verdict weighing power to the trial judge. A trial judge may set aside a verdict on a motion for a new trial if the verdict, in his opinion, is against the weight of the evidence for such a verdict is either not sustained by sufficient evidence or is contrary to law.[48] Therefore, the new trial motion requires the trial judge to weigh the evidence in terms of its probative value and as to which party the evidence preponderates. But in ruling on the motion for a directed verdict the judicial consideration is focused upon a decision as to what evidence reasonably remains favorable to the proponent which may be placed in the scales of preponderance of which the jury is the weighmaster.

A verdict is not properly directed when, in the opinion of the court, evidence favorable to the movant probatively outweighs that evidence which is favorable to the proponent.[49] Yet, if the jury returns a verdict favorable to the proponent, the court may set it aside by granting a motion for a new trial.[50] This power to weigh the evidence upon a motion for a new trial presents an apparent paradox, for the trial judge is seemingly empowered to set aside a verdict that he cannot prevent. In most cases, up-

46. New York Cent. R.R. Co. v. Powell, 221 Ind. 321, 47 N.E.2d 615 (1943).

47. "If a trial court is permitted to weigh the evidence and direct the action of the jury, when there is conflict in the evidence or conflicting inferences can reasonably be drawn therefrom, the right of trial by jury, which is protected by the Bill of Rights in both our Federal and State Constitutions, will be violated." Moslander v. Moslander's Estate, 110 Ind. App. 122, 127, 38 N.E.2d 268, 270 (1941); Phares v. Carr, 122 Ind. App. 597, 106 N.E.2d 242 (1952). For an excellent discussion of the duties of both the trial judge and jury in relation to weighing the evidence, the former both before and after the verdict and the later at the pre-verdict stage of the trial, see State *ex rel.* Winslow v. Fisher, 109 Ind. App. 644, 37 N.E.2d 280 (1941).

48. Wilson v. Rollings, 214 Ind. 155, 14 N.E.2d 905 (1937).

49. Haughton v. Aetna Life Ins. Co., 165 Ind. 32, 73 N.E. 592 (1905).

50. An early statement of the rule appears to grant this weighing power to the trial judge. "A judge should not submit a question to the jury where their verdict, if contrary to his views of the evidence and its legal effect, would be set aside, as against the law and the evidence." Williams v. Resener, 25 Ind. App. 132, 133, 56 N.E. 857, 858 (1900). This statement of the rule resulted from judicial omission of a significant qualification which now appears in the accepted statement of the rule that: "If the evidence for the defense satisfied the court that appellant [plaintiff] ought not to recover and that a verdict for appellant ought to be set aside as being contrary to the weight of the evidence, it was not the court's province to instruct the jury to return a verdict for appellee [defendant]. It is only when the plaintiff fails to make a case, so that it would be the duty of the trial court or of a higher court on appeal to set aside the verdict as not being supported by any competent evidence on some material point, that a verdict for the defendant should be directed." Diezi v. Hammond Co., 156 Ind. 583, 588, 60 N.E. 353, 355 (1900).

on a motion for a directed verdict, the weight properly assignable to evidence will be a question of fact. Weight implies conflict, the reconciliation of which is a factual decision for the jury. But there may also be evidentiary situations in which, on motion for a directed verdict, weight of the evidence can become a question of law. The weight of evidence may only become a question of law on a motion for a directed verdict at that point where the qualitative value of evidence favorable to the movant conclusively eradicates evidence which would favor the proponent under the "deemed to be withdrawn" rule. A jury verdict favorable to the proponent would be unreasonable in this situation because it would have to be based upon speculation, surmise, conjecture, or any other qualitative description that amounts to a legal absence of evidence. Hence, in this narrow area of clear unreasonableness, the court should properly direct a verdict for the movant. A basic policy of the adversary system for the settlement of disputes is found in the power of the jury to decide questions of fact by weighing the evidence. However, this policy should not be allowed to obscure the necessary judicial function of preventing unreasonableness in fact and law. If a proper balance of these powers is to be maintained between court and jury, the court must always weigh the evidence upon a motion for a directed verdict in the limited sense of preventing clear unreasonableness.[51] It is in this sense that the paradox is but an apparent one.[52]

In the recent case of *Whitaker v. Borntrager*,[53] the plaintiff, as administrator of the estate of the decedent, brought an action under the wrongful death statute. The decedent was killed as a result of being hit

51. In the Hummel case the court said that it could not properly weigh conflicting portions of the testimony of the same witness. "Yet while we will not weigh it, the evidence that will support a finding must be substantial evidence. It must be evidence which has probative value." 117 Ind. App. at 25, 66 N.E.2d at 902. Whether or not the function be called "weighing the evidence," the court has accomplished the result of determining the qualitative sufficiency of the evidence. Probative value and substantial evidence appear to be equated with reasonableness or reasonable doubt; speculation, surmise or conjecture appear to be equated with an unreasonableness in finding the ultimate propositions. It is such an unreasonableness that the court may prevent.

52. The paradox becomes real only when the court exercises its discretionary power in setting aside a verdict. If it could be said that a trial judge would set aside a verdict which has an evidentiary foundation in either reason or reasonable doubt, the paradox would also be a real one. However, such an occurrence does not seem likely.

This interpretation of the Indiana cases demonstrates a substantial agreement with the New York statute that governs the direction of a verdict. "The court may direct a verdict when it would be required to set aside a contrary verdict for legal insufficiency of evidence." N.Y. CIV. PRAC. ACT § 457-a. The only significant difference is that, in determining whether there is a legal insufficiency of evidence, the New York courts subject evidence favorable to the movant to the "deemed to be withdrawn" rule. *Fifteenth Annual Report of the Judicial Council of the State of New York* 245, 250 (1949); Rothschild, *Summary Judical Power*, 19 CORNELL L. Q. 361 (1934); Smith, *supra* note 4; Note, 22 COLUM. L. REV. 256 (1922).

53. 233 Ind. 678, 122 N.E.2d 734 (1954).

by the defendant who was operating a truck, after dark, in a northerly direction along a highway. The defendant did not see the decedent until seconds before the accident, and there was damage to the grill and radiator in the center of the front of the truck. At the time the body was hit, a tractor travelling south on the same highway passed the defendant. The question with which both the trial and appellate courts were faced was the determination of the exact location of the decedent immediately prior to the collision. At the close of the plaintiff's evidence the trial court sustained the defendant's motion for a directed verdict, apparently on the basis that, since the defendant did not see the decedent until seconds prior to the collision, the only inference that could reasonably be drawn was that the decedent jumped from the rear of the passing tractor onto the hood of the truck, and that therefore the defendant was not negligent.[54] This ruling was reversed on appeal. The basis of the reversal was that it might reasonably be inferred from the physical conditions surrounding the collision that the death was caused by the defendant's negligence. There being more than one inference reasonably deducible from the evidence, the verdict was improperly directed.

The court, perhaps, realized the need for clarification of the directed verdict in Indiana, for its discussion of the merits of the case was prefaced by this hypothetical question: "When may a trial court properly give the trial jury a peremptory instruction to find [direct a verdict] for the defendant?" After stating the "total absence of evidence or legitimate inference" rule discussed above, the court established by strong dicta that a verdict may also be directed for the defendant "where the evidence is without conflict and is susceptible of but one inference and that inference is in favor of the defendant."[55] These standards have been accepted as "the fundamental and well-established rules and principles for the guidance of trial courts in determining upon a motion for a directed verdict."[56]

Because oral testimony will be required to establish the ultimate propositions in nearly every case, the "without conflict" standard necessitates an examination of the Indiana courts' treatment of oral testimony upon a motion for a directed verdict. As a general rule, the credibility of a witness is a factual question to be decided by the jury, for the right

54. See Brief for Appellant, pp. 17, 18; Brief for Appellee, pp. 10, 11, Whitaker v. Borntrager, 233 Ind. 678, 122 N.E.2d 734 (1954).

55. 233 Ind. at 680, 122 N.E.2d at 734.

56. Johnson v. Estate of Gaugh, 125 Ind. App. 510, 513, 124 N.E.2d 704, 706 (1955); Callahan v. New York Cent. R.R. Co., 125 Ind. App. 631, 125 N.E.2d 263 (1955).

to believe or disbelieve presents a conflict which the jury must reconcile.[57] But there must be a limitation upon this power to believe or disbelieve, for if the power was without limit, credibility would always be in issue and a directed verdict would never be proper. The fact that there is a limitation upon the power indicates that, when the court uses the term credibility, it states a legal conclusion that the power to believe or disbelieve rests with the jury in the particular case.

Application of preliminary judicial controls to the testimony will determine whether an issue of credibility has been raised. A witness should not be disbelieved because of mere caprice or without cause,[58] and if the court can say, as a matter of law, that the testimony of a witness is contrary to scientific principles, the law of nature, or the physical facts,[59] no factual issue of credibility is raised for jury determination. These controls stem, once again, from the concept of reasonableness for a verdict based on such testimony would require arbitrary rather than reasonable jury conduct. Due cause for jury disbelief of oral testimony may be found in one of several considerations which are guides for jury evaluation of the witness and his testimony. These considerations are the interest of the witness in the outcome of the litigation, his bias and prejudice, if any, the probability or improbability of his testimony, and his demeanor on the witness stand.[60] The court has erroneously preempted the jury of these functions of determining credibility in several

57. Cates v. Long, 117 Ind. App. 444, 72 N.E.2d 233 (1946). "It is the right of the jury to weigh the evidence, and, in so doing, to reconcile conflict, if possible, and, if not possible, to reject that which is unworthy of belief. . . . The court was not authorized to weigh conflicting evidence, even where there was but one witness, and even though the conflict appeared between the evidence given on direct and cross-examination." Tarnowski v. Lake Shore & M.S. R.R. Co., 181 Ind. 202, 209, 104 N.E. 16, 18 (1913). However, a motion by each party that a verdict be directed in his favor has the effect of an admission that there is no conflict in the testimony and a request that the facts be determined by the trial court. Indianapolis Traction & Terminal Co. v. Vaughn, 65 Ind. App. 581, 117 N.E. 673 (1917).

58. Chicago, M. & St. P. R.R. Co. v. Turpin, 82 Ind. App. 78, 145 N.E. 316 (1924).

59. Neuwelt v. Roush, 119 Ind. App. 481, 85 N.E.2d 506 (1949); Connor v. Jones, 115 Ind. App. 660, 59 N.E.2d 577 (1944). But, in Kostial v. Aero Mayflower Transit Co., 119 Ind. App. 377, 85 N.E.2d 644 (1949), the trial court directed a verdict for the defendant at the close of the plaintiff's evidence. The Appellate court reversed this ruling. The majority, on appeal, found that, "while there is some contradiction in the testimony of the only eye witness as to whether decedent was standing on the paved road or just off of it at the time of the accident, the jury had the right to determine this matter." *Id.* at 380, 85 N.E.2d at 645. The dissenting opinion found that the decedent *had* to be standing on the paved portion of the road, for if he had been standing off the road, the physical fact of damage to the nearby automobile could not have occurred. The dissent would have affirmed the trial judge's direction of the verdict since these physical facts made the decedent contributorily negligent as a matter of law. *Id.* at 381, 85 N.E.2d at 645. See State v. Robbins, 221 Ind. 125, 46 N.E.2d 691 (1943), for another example of trial and appellate court difference of opinion as to factual possibility.

60. Pohlman v. Perry, 122 Ind. App. 222, 103 N.E.2d 911 (1951); Sevald v. Chicago & Calumet Dist. Transit Co., 119 Ind. App. 33, 82 N.E.2d 270 (1948).

cases[61] by accepting uncontradicted testimony favorable to the movant as true and affirming the direction of the verdict on that basis.

Frick v. Bickel[62] was a case brought by the plaintiff against the owner of a vehicle to recover for injuries sustained as a result of the admitted negligence of the driver of the vehicle. The plaintiff established in evidence that the defendant was the owner of the vehicle, that the driver was in the general employ of the defendant, and that the accident occurred shortly after 5:00 in the afternoon as the driver proceeded to his home. Employees testified that the defendant's vehicles were not to be driven to and from work without obtaining, on each occasion, the express permission of the defendant. One employee testified that shortly before 5:00 on the day in question, the negligent driver had come to the office seeking the defendant in order to obtain permission to drive the vehicle to his home. The defendant was not there, and the driver was unable to locate him by telephone, whereupon the driver proceeded with th vehicle. The accident happened shortly thereafter. At the close of all the evidence, the trial court overruled the defendant's motion for a directed verdict, and the jury returned a verdict for the plaintiff. The defendant appealed from the overruling of his motion for a new trial. The Indiana Appellate court held that the requested directed verdict should have been granted. The theory of the reversal is simple, but its application to the facts is erroneous. The court held that "evidence of ownership coupled with proof of general employment and the presumption that arises therefrom [that the driver was within the scope of his employment at the time of the accident] makes a prima facie case sufficient to go to the jury."[63] This is sound. The court continued: "The jury cannot arbitrarily or capriciously disregard the undisputed testimony of credible witnesses introduced to obviate the effect of the presumption." This is unsound in two respects. First, the court assumes the truth of witnesses whom the court has never seen. It does not seem logical that truth can so clearly appear upon a bare record, especially when the trial judge has denied both the motion for a directed verdict and the motion for a new trial.[64] Secondly, the court totally disregards the significant fact that the rebutting evidence came from the mouths of interested witnesses and in a situation where the facts were peculiarly

61. Worster v. Caylor, 231 Ind. 625, 110 N.E.2d 337 (1952); Robinson v. Ferguson, 107 Ind. App. 107, 22 N.E.2d 901 (1939).
62. 115 Ind. App. 114, 54 N.E.2d 436 (1944).
63. *Id.* at 120, 54 N.E.2d at 438.
64. American Ins. Co. v. Paggett, 73 Ind. App. 677, 128 N.E. 468 (1920).

within the knowledge of the defendant.[65] By treating the presumption as having "vanished or become inoperative[66] in the face of clear, credible and undisputed evidence in rebuttal thereof,"[67] the court has coerced a belief of evidence favorable to the movant thereby usurping the jury function of deciding credibility.[68]

Although the court does not explain their reason for coercing belief in the *Frick* case, the holding is apparently based upon the theory that a failure to contradict testimony amounts to a tacit admission of its veracity.[69] If this argument is sound, it should be restricted to those cases in which it would be reasonable to expect the proponent to have at least some access to evidence with which to make the contradiction. The rule has not been applied to all cases and the better theory is that even though testimony is not contradicted, an issue of credibility should be raised so that the jury may apply the considerations of interest, bias, candor and probability.[70] The credibility of oral testimony is but one facet of the

65. The facts in Brandenburg v. Buchta, 233 Ind. 221, 117 N.E.2d 643 (1953), were very similar to those in Frick v. Bickel, 115 Ind. App. 114, 54 N.E.2d 436 (1944), but the motion for a directed verdict was made by the defendant at the close of the plaintiff's case in chief. The granting of this motion was reversed on appeal. The court held that since the facts were peculiarly within the knowledge of the defendant, he should be required to go forward with proof that the vehicle was being operated without his authority. If such proof had been adduced, it may be speculated that the court would have followed the *Frick* case in allowing a directed verdict on the erroneous ground of the vanished inference. See Pohlman v. Perry, 122 Ind. App. 222, 103 N.E.2d 911 (1951).

66. This erroneous theory has also been applied where the plaintiff, having no access to the facts, seeks to invoke the doctrine of *res ipsa loquitur* in order to establish a prima facie case. "It will be noted that the doctrine *res ipsa loquitur* does not prevail where the party against whom it might apply accepts the duty of going on with the proof and details the entire transaction. In such a situation the presumption, inference or doctrine ceases to exist and all questions concerning the injury must be determined from the evidence unaided by the inference or doctrine of *res ipsa loquitur*." Worster v. Caylor, 231 Ind. 625, 632, 110 N.E.2d 337, 340 (1952); Robinson v. Ferguson, 107 Ind. App. 107, 22 N.E.2d 901 (1939). See Kaiser v. Happel, 219 Ind. 28, 36 N.E.2d 784 (1941), holding that the presumption of the sanity of a testator is not evidence.

A different approach was voiced by the court in Magazine v. Shull, 116 Ind. App. 79, 60 N.E.2d 611 (1945), in holding that a reasonable and legitimate inference *was* competent evidence. If the inference is competent evidence, it creates a conflict in the evidence and the case must go to the jury. But, even if the inference is not evidence, as such, it seems unreasonable to allow uncontradicted testimony to destroy its reasonableness in situations such as was presented in the *Frick* case. For a discussion lending support to the Indiana court's treatment of a presumption or inference in these cases see Note, 31 CALIF. L. REV. 108 (1942).

67. 115 Ind. App. at 122, 54 N.E.2d at 439.

68. See O'Dea v. Amodeo, 118 Conn. 58, 170 A. 486 (1934).

69. Chicago, M. & St. P. R.R. Co. v. Turpin, 82 Ind. App. 78, 145 N.E. 316 (1924).

70. Pohlman v. Perry, 122 Ind. App. 222, 103 N.E.2d 911 (1951); Sevald v. Chicago & Calumet Dist. Transit Co., 119 Ind. App. 33, 82 N.E.2d 270 (1948); Goldberg v. Britton, 119 Ind. App. 90, 84 N.E.2d 201 (1948); Neuwelt v. Roush, 119 Ind. App. 481, 85 N.E.2d 506 (1949). See Note, 37 DICK. L. REV. 213 (1933), for a discussion of the problem of the power of the court to direct a verdict on undisputed, uncontradicted oral testimony.

broader problem of weighing the evidence that confronts both court and jury. It has been posited above that the court does, in a sense, weigh the evidence. It is in this same sense that the court should perform the function of evaluating oral testimony. Certainly the rules as to testimony contrary to the laws of science and nature should be judicially applied upon a motion for a directed verdict.[71] Unreasonableness found under the second phase of the dual-reasonableness test should also warrant a proper directed verdict but the application of the test should be tempered by the traditional jury considerations.

It seems necessary to conclude that immediate clarification of the motion for a directed verdict in Indiana is mandatory. The attempted clarification in the *Whitaker* case is creditable. But the standards adopted there demand further classification and explanation in terms of their application to the various burden of proof situations with which trial judges are constantly confronted. By adopting the "total absence of evidence or legitimate inferences" and "evidence is without conflict" tests, the Indiana Supreme court assumed that trial judges already had an adequate pattern to follow in subjecting the evidence to the crucial qualitative and quantitative tests which the motion for a directed verdict demands. Both the close restraint upon the trial court power to weigh the evidence, which includes the concepts of conflict and credibility, and earlier cases which adopt the "deemed to be withdrawn" rule have resulted in confusion as to the proper role which evidence favorable to the movant is to play in ruling upon the motion. Still, reasonableness and the prevention of unreasonableness appear to be the common denominator which the appellate courts desire the trial judge to utilize in ruling on the motion and which has been and will continue to be utilized upon appellate review. The very subjective nature, not only of the concept of reasonableness but also of evidence, inferences and the applicable law itself, indicates that there will always be disagreement between trial and appellate tribunals as to the propriety of a directed verdict in a given evidentiary situation. However, this high degree of subjectivity should not restrain the upper court from giving trial judges a clear procedural mandate to guide them in ruling on a motion for a directed verdict. This mandate is the key to a much higher percentage of correct trial court rulings upon the motion for a directed verdict.

The erroneous grant or refusal of a directed verdict in Indiana trial

71. The court has also indicated that a directed verdict would be proper if evidence favorable to the proponent demonstrates a situation contrary to ordinary human experience. Kandea v. Inland Amusement Co., 220 Ind. 219, 41 N.E.2d 795 (1942).

courts, a frequent cause of reversal by appellate tribunals,[72] generally may only be remedied in the trial court by the grant of the motion for a new trial and in the appellate courts by remand for a new trial.[73] Consequently, litigants are directly penalized by expense and delay.[74] The *prevention* of the error that causes the penalty is of primary importance and the only preventative remedy will be the enunciation of a comprehensive, unequivocal standard. Only after the adoption of such a standard will trial judges be able to confidently determine whether a directed verdict is proper in the given evidentiary situation.

The *correction* of trial court error is of secondary importance. Still it seems desirable to adopt a procedure whereby, if the trial court errs in ruling on the motion, that court or an appellate court would have the power to set aside an erroneous jury verdict and enter judgment for the party entitled to judgment as a matter of law.

This result could be accomplished by the adoption of Federal Rule 50[75] which was recommended by the Judicial Council of Indiana in 1948.[76] But such action would not solve the problem of an inadequately enunciated standard for a directed verdict, for under the federal practice there exists a similar need for a device by which to determine whether a given evidentiary situation presents a question of fact for the jury or a question of law for the court. Federal Rule 50 would benefit Indiana litigants only to the extent that, when the trial court erroneously refuses to grant a directed verdict, the entry of a correct judgment could be made either upon motion at the post-verdict stage in the trial court or at

72. *E.g.*, Whitaker v. Borntrager, 233 Ind. 678, 122 N.E.2d 734 (1954); Brandenburg v. Buchta, 233 Ind. 221, 117 N.E.2d 643 (1953); Johnson v. Estate of Gaugh, 125 Ind. App. 510, 124 N.E.2d 704 (1955); Callahan v. New York Cent. R.R. Co., 125 Ind. App. 631, 125 N.E.2d 263 (1955); Kostial v. Aero Mayflower Transit Co., 119 Ind. App. 377, 85 N.E.2d 644 (1949).

73. IND. ANN. STAT. § 2-2501 (1946) provides: "When a trial by jury has been had, and a general verdict rendered, the judgment must be in conformity to the verdict." Where, however, a case is tried to the court, and all of the evidence is by admissions in the pleadings or by stipulation, the appellate tribunal can remand with an order that the trial court enter the proper judgement. Goldberg v. Britton, 119 Ind. App. 90, 84 N.E.2d 201 (1948); Conwell Bank v. Kessler, 94 Ind. App. 256, 180 N.E. 625 (1931). A case is also considered to have been tried to the court when both parties have moved for a directed verdict. Continental Casualty Co. v. Klinge, 82 Ind. App. 277, 144 N.E. 246 (1924).

74. See Scott, *The Reform of Civil Procedure,* 31 HARV. L. REV. 667 (1918); Thayer, *Judicial Administration,* 63 U. PA. L. REV. 585 (1915).

75. FED. R. CIV. P. 50.

76. REPORT OF THE JUDICIAL COUNCIL OF INDIANA (1948). This recommendation was submitted to the Governor, the Supreme Court and the General Assembly of Indiana, but correspondence with the then members of the Council has failed to uncover either the juncture at which this recommendation was overruled or the policy considerations which affected that action.

the appellate level.[77] Only a very few cases involving a trial court *failure* to direct a verdict have reached the Indiana appellate courts.[78] Such a rule would, however, foreclose the plaintiff's right to take a voluntary dismissal when the initial motion for a directed verdict is made.[79] The interests favored by the federal practice seem to outweigh those benefited under present Indiana practice. But before any move toward adoption is made, it seems desirable to re-examine the primary problem of a clear directed verdict standard. Clarification of this standard followed by an adoption of the federal practice appear to be presently needed steps forward in the prevention of unreasonableness.

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77. But appellate correction of a trial court error in erroneously refusing to direct a verdict in favor of the defendant effectuates nearly the same result as does the entry of proper judgment in the federal practice. In Wait v. Westfall, 161 Ind. 648, 68 N.E. 271 (1903), the Indiana Supreme court corrected such a trial court error by remanding for a new trial. On re-trial, the plaintiff introduced substantially the same evidence as before and the trial court directed a verdict in favor of the defendant. The plaintiff appealed. The trial court direction was affirmed on the basis of res judicata. Westfall v. Wait, 165 Ind. 353, 73 N.E. 1089 (1905). Therefore, if the appellate tribunal remands on the basis of trial court error in refusing to direct in favor of the defendant, unless the plaintiff can procure new evidence, the parties may consider the litigation effectively ended. However, the new trial order still subjects the defendant to the risk that the plaintiff will succumb to the temptation of educating his witnesses so that the evidence on re-trial may satisfy the qualitative defect found in the initial trial of the case. One certain consequence of our seemingly anti-defendant policy is that the plaintiff is placed in a superior bargaining position for out of court settlement prior to re-trial.

Some states have been able to mitigate the harsh consequences of the new trial requirement by extending the traditional common law plaintiff's motion of judgment *non obstante veredicto* to the defendant, enabling the defendant to make a post-verdict evidentiary attack upon the plaintiff's case prior to an appeal. Carlin, *Judgment Non Obstante Veredicto,* 51 W. VA. L. Q. 14 (1948); Note, 34 MICH. L. REV. 93 (1935).

78. Pittsburgh, C., C., & St. L. R.R. Co. v. Sievers, 162 Ind. 234, 67 N.E. 680 (1903); New York Cent. R.R. Co. v. Verkins, 125 Ind. App. 320, 122 N.E.2d 141 (1954); Tribune-Star Pub. Co. v. Fortwendle, 124 Ind. App. 618, 115 N.E.2d 215 (1954); Cates v. Long, 117 Ind. App. 444, 72 N.E.2d 233 (1946). Any estimate of the number of unreported trial cases in which the federal practice would speed litigation would be highly speculative, but adoption would serve the useful function of allowing the trial judge to reflect upon the evidence after receiving the jury verdict. The time interval would allow the trial judge to more accurately appraise the evidence, so that on the subsequent motion for judgment notwithstanding the verdict, more correct rulings would be forthcoming from the trial courts.

79. "An action may be dismissed without prejudice—First. By the plaintiff, before the jury retires; or, when the trial is by the court, at any time before the finding of the court is announced. . . ." IND. ANN. STAT. § 2-901 (1946). This statute has been liberally construed for the benefit of the plaintiff even to the extent that, "where a trial court has stated what he was going to do, with respect to what the finding would be, but has not as a matter of fact announced the finding," the plaintiff may avail himself of the statute and dismiss without prejudice. Eason v. Northern Indiana Pub. Serv. Co., 124 Ind. App. 53, 59, 114 N.E.2d 887, 889 (1953); Van Sant v. Wentworth, 60 Ind. App. 591, 108 N.E. 975 (1915).