No. 86109-9

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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JAMES BIRD,

Plaintiff/Respondent,

vs.

BEST PLUMBING GROUP, LLC,

Defendant,

v.

FARMERS INSURANCE EXCHANGE,

Intervenor/Petitioner.

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BRIEF OF AMICUS CURIAE WASHINGTON STATE ASSOCIATION FOR JUSTICE FOUNDATION

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On Behalf of
Washington State
Association for Justice
Foundation

ORIGINAL

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I. IDENTITY AND INTEREST OF AMICUS CURIAE

The Washington State Association for Justice Foundation (WSAJ Foundation) is a not-for-profit corporation organized under Washington law, and a supporting organization to the Washington State Association for Justice (WSAJ). WSAJ Foundation is the new name of Washington State Trial Lawyers Association Foundation (WSTLA Foundation), a supporting organization to Washington State Trial Lawyers Association (WSTLA), now renamed WSAJ. WSAJ Foundation, which operates the amicus curiae program formerly operated by WSTLA Foundation, has an interest in the rights of plaintiffs under the civil justice system, including an interest in the right of litigants in civil cases to trial by jury and due process of law.

II. INTRODUCTION AND STATEMENT OF THE CASE

This appeal involves whether the covenant judgment procedure, approved by the Court in cases where a liability insurer is alleged to have acted in bad faith in failing to protect its insured's interest, is constitutionally flawed. Intervenor/petitioner Farmers Insurance Exchange (Farmers) principally argues it was denied the right to trial by jury under Washington Constitution Art. I § 21 in the covenant judgment reasonableness hearing conducted in this case, and is also denied due process because the settlement amount determined reasonable is deemed the presumptive measure of damages in the subsequent bad faith litigation.

This case arises out of an action for negligence and trespass brought by James Bird (Bird) against Best Plumbing Group, LLC (Best Plumbing), involving claims for personal injuries and property damage. See Bird v. Best Plumbing Grp., LLC, 161 Wn.App. 510, 514-15, 260 P.3d 209, *review granted*, 172 Wn.2d 1010 (2011). The underlying facts are drawn from the Court of Appeals opinion and the briefing of the parties. See Farmers Br. at 1, 3-9; Bird Br. at 1-3, 5-25; Farmers Pet. for Rev. at 1-3; Bird Resp. to Pet. for Rev. at 1-7; Farmers Supp. Br. at 1-5; Bird Supp. Br. at 1-2.

For purposes of this amicus curiae brief, the following facts are relevant: Bird was granted partial summary judgment against Best Plumbing on the trespass claim. Farmers, as Best Plumbing's liability insurer, subsequently rejected a policy limits offer to settle Bird's claims against Best Plumbing. Thereafter, Best Plumbing obtained personal counsel and reached a settlement with Bird, including a $3.75 million stipulated judgment, a covenant not to execute against Best Plumbing, and an assignment of Best Plumbing's rights against Farmers for breach of contract, insurance bad faith and related claims (insurance bad faith).

Bird moved the superior court for a determination that this "covenant judgment" settlement was reasonable.[1] Farmers received notice of the reasonableness hearing and was allowed to intervene and participate in the hearing, but the superior court rejected Farmers' demand for a jury

[1] See Besel v. Viking Ins. Co., 146 Wn.2d 730, 738, 49 P.3d 887 (2002) (referring to this type of settlement as a "covenant judgment").

trial. Following discovery, the superior court conducted a four-day reasonableness hearing and concluded the covenant judgment settlement amount was reasonable.

Farmers appealed, mainly challenging the superior court's denial of its jury demand and the court's reasonableness determination. The Court of Appeals, Division I, affirmed, concluding that a reasonableness hearing is an equitable proceeding to which the right to trial by jury does not apply, and that the superior court did not abuse its discretion in determining the covenant judgment settlement amount was reasonable. See Bird, 161 Wn.App. at 516-31.[2] This Court granted review.

III. ISSUES PRESENTED

The following issues are discussed in this brief:

1) Whether the right to trial by jury under Washington Constitution Art. I § 21 applies to a reasonableness hearing conducted in conjunction with a covenant judgment settlement?

2) Whether this Court's holdings in Besel v. Viking Ins. Co., 146 Wn.2d 730, 49 P.3d 887 (2002), and Mutual of Enumclaw v. T&G Constr., 165 Wn.2d 255, 199 P.3d 376 (2008), establishing that a reasonable covenant judgment establishes the presumptive measure of damages in a subsequent action based on insurance bad faith, offend due process under Washington Constitution Art. I § 3 or its federal counterpart?

[2] Regarding the jury trial issue, the Court of Appeals basically found that the reasonableness hearing procedure is based on RCW 4.22.060, and that no right to trial by jury attaches to this type of proceeding because it is equitable in nature, relying upon this Court's decision in Schmidt v. Cornerstone Investments, Inc., 115 Wn.2d 148, 795 P.2d 1143 (1990).

See Farmers Pet. for Rev. at 1.[3]

IV. SUMMARY OF ARGUMENT

Re: Trial by Jury

The right to trial by jury under Washington Constitution Art. I § 21 does not apply to a reasonableness hearing regarding a covenant judgment. This type of hearing occurs in the course of avoiding trial on the underlying cause of action, and the issues to which the right to trial by jury would attach have passed out of the case by virtue of the settlement between the parties. The hearing involves issues of fact (and law) bearing on the reasonableness of the covenant judgment amount, not the ultimate facts of the underlying case. It is conducted to ensure that the civil justice system is not ill-used in enforcing the covenant judgment. Farmers' demand for a jury in the context of such a reasonableness hearing is properly rejected.

Farmers' claim of right to trial by jury on the issue of damages in the subsequent insurance bad faith action is not directly involved in this appeal. Nonetheless, given that the covenant judgment in this action was found reasonable and Farmers had the opportunity to fully participate in the reasonableness hearing, it is precluded in the insurance bad faith action from challenging the amount of the covenant judgment. It is well-settled

[3] Farmers also raises an issue regarding interpretation of the trespass statute, RCW 4.24.630. See Farmers Pet. for Rev. at 1. It appears this issue would not need to be reached unless the Court finds a jury trial or due process violation and remands for another reasonableness hearing.

that precluding a party from relitigating an issue does not implicate the right to trial by jury.

Re: Due Process

Farmers' due process claim regarding the manner in which the reasonableness hearing was conducted necessarily fails if it is not entitled to a jury trial in that proceeding. (There is otherwise no claim of procedural due process associated with the manner in which the reasonableness hearing was conducted.)

Farmers' separate due process challenge to the rule that the covenant judgment amount constitutes the presumptive measure of damages in the subsequent bad faith action likewise fails based on well-settled preclusion principles.

V. ARGUMENT

Introduction

In a series of cases this Court has shaped and approved the covenant judgment settlement mechanism to allow insureds to extricate themselves from tort litigation when faced with perceived bad faith conduct by their liability insurers. See Safeco Ins. v. Butler, 118 Wn.2d 383, 823 P.2d 499 (1992); Besel, supra; T&G Constr., supra. In so doing, the Court has balanced the interests of plaintiffs, insureds and insurers, and established the amount of a reasonable covenant judgment as the presumptive measure of damages in a subsequent insurance bad faith action against the insurer. See Besel, 146 Wn.2d at 738-39. The

reasonableness of the covenant judgment is determined in an ancillary, post-settlement proceeding, and, among other things, a finding of reasonableness serves to ensure that the parties do not ill-use the civil justice system by obtaining a consent judgment that is unreasonable, collusive or fraudulent. See id. at 737-38.[4] Farmers now argues that the end result of the Court's work in fashioning this complex tort remedy is a denial of its rights to trial by jury and due process.

A) The Right To Trial By Jury Under Washington Constitution Art. I § 21 Does Not Attach To Covenant Judgment Reasonableness Hearings Because The Issues To Which The Right Would Attach Pass Out Of The Case By Virtue Of The Settlement Between The Parties.

Under Washington Constitution Art. I § 21, the right to trial by jury is "inviolate."[5] This provision entitles litigants to have a jury determine issues of fact to which it attaches. In determining whether the right is triggered, the Court looks to the scope of the jury trial right as it existed at the time the state constitution was adopted in 1889, and asks whether the particular cause of action or factual inquiry is one to which the right attached. See Sofie v. Fibreboard Corp., 112 Wn.2d 636, 644-45,

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[4] In Chaussee v. Maryland Casualty Co., 60 Wn.App. 504, 511-13, 803 P.2d 1339, 812 P.2d 487, *review denied*, 117 Wn.2d 1018 (1991), the Court of Appeals first enumerated the criteria for evaluating the reasonableness of a covenant judgment settlement, borrowing them from the factors established in Glover v. Tacoma Gen. Hosp., 98 Wn.2d 708, 717, 658 P.2d 1230 (1983), for determining the reasonableness of tort settlements under RCW 4.22.060. See also Besel, 146 Wn.2d at 738-39 (approving "*Chaussee* criteria" in covenant judgment context).

To the extent the Court of Appeals opinion below can be read as suggesting that Chaussee and Besel applied RCW 4.22.060 to covenant judgment reasonableness proceedings, WSAJ Foundation disagrees. See Bird, 161 Wn.App. at 518-19. Use of the same factors for determining reasonableness in the covenant judgment context does not mean that RCW 4.22.060 otherwise applies in the covenant judgment context.

[5] The full text of Washington Constitution Art. I § 21 is reproduced in the Appendix to this brief.

771 P.2d 711, 780 P.2d 260 (1989); Endicott v. Icicle Seafoods, Inc., 167 Wn.2d 873, 884-85, 224 P.3d 761 (2010).

There is no question that, historically, the issue of the damages recoverable in a civil action—sounding in law, as opposed to equity—is one for the jury. See Sofie, 112 Wn.2d at 645-47. Farmers claims a right to trial by jury, urging that a reasonableness hearing involves a determination of damages. See Farmers Supp. Br. at 1. This is incorrect. The trial court does not fix the amount of damages in a reasonableness hearing. The settlement eliminates the need to adjudicate any disputed issues of liability and damages between the parties. The reasonableness hearing focuses on the question of whether the covenant judgment amount is reasonable, a far different inquiry than a determination of damages in the underlying claim.

The post-settlement determination of reasonableness is analogous to post-default determinations of damages, to which the right to trial by jury does not attach. After entry of an order of default, a defendant does not have the constitutional right to a trial by jury on the remaining issues of damages, because the fact issues for trial pass out of the case after the order of default. The remaining inquiry is for the court alone. See Johanson v. United Truck Lines, 62 Wn.2d 437, 444-45, 383 P.2d 512 (1963).

In Johanson, the superior court entered an order conditionally vacating a default judgment and granting a trial solely on the issue of

damages, on condition that the defaulting defendant agreed to try the issue to the court, not a jury. The governing statutory provision, former RCW 4.56.160(2), provided that the court "may order the damages to be assessed by a jury." See id., 62 Wn.2d at 444 & n.8. The defaulting defendant argued that a jury trial is *required* by the constitution. See id. This Court disagreed, relying substantially on the Oregon Supreme Court's opinion in Dean v. Willamette Bridge Co., 29 Pac. 440 (Or. 1892), which involved a similar constitutional provision and rejected a similar argument. The Court adopted the reasoning of the Oregon court that the "inquiry into damages" after entry of an order of default stands on a different footing than what occurs at trial because "the cause of action stands confessed" upon default. See Johanson at 445 (quoting Dean).[6]

This principle derived from Johanson (and Dean) is even more applicable here for two reasons. First, the "confession" is explicit in the case of a covenant judgment settlement, whereas it is merely implicit in the case of a default. Cf. Haller v. Wallis, 89 Wn.2d 539, 544, 573 P.2d 1302 (1978) (recognizing more stringent grounds for vacation of judgment by consent than judgment by mere default). Second, unlike the default context, the court's reasonableness hearing inquiry is less exacting in the sense that it involves determining whether the settlement is reasonable,

[6] The court in Dean differentiated between the right to a jury regarding factual issues at trial, as opposed to the fact finding function in determining damages following an order of default, which is "to inform the mind or conscience of the court." See 29 Pac. at 442; accord id. at 441 (referring to "an inquest of office to inform the conscience of the court"; internal quotation omitted). Informing the conscience of the court accurately portrays the purpose of the reasonableness hearing in the covenant judgment context, as described in Besel at 737-39.

given what is known at the time of the consent judgment, rather than fixing the precise amount of damage.

Johanson appears to be at odds with Baker v. Prewett, 3 Wash. Terr. 474 & 595 (1888), which it does not reference.[7] Baker upheld the right to jury trial regarding the issue of damages following an order of default, and the case is cited in the majority opinion in Sofie as supportive of the right to trial by jury on the issue of damages. See Sofie, 112 Wn.2d at 645. In his dissent in Sofie, Justice Dolliver points out that Baker is arguably incorrect because the statute on which the Court relied for the right to trial by jury was phrased in terms of the permissive "may" rather than the mandatory "shall." See id. at 680-81 (Dolliver, J., dissenting). The majority in Sofie specifically addresses Justice Dolliver's concern, but does not disagree with his reading of the relevant statute. See id. at 664. Instead, the majority appears to abstract a more basic underlying principle from Baker regarding the right to have a jury determine damages. See id.[8]

Johnanson is correct that the issue of damages following an order of default is *not* subject to a constitutional right to trial by jury. It appears that the Territorial Supreme Court's opinion in Baker misapprehended the statutory law in effect at the time in determining a trial by jury was mandatory after an order of default. The 1881 Territorial Code § 289 provided that following an order of default the court "may order the

[7] There are actually two opinions in Baker, published in the same volume of the Territorial Reports at the cited pages.

[8] In a separate dissent in Sofie, Chief Justice Callow states that the holding in Baker was "in effect overruled" by Johanson. See Sofie, 112 Wn.2d at 670, 674 (Callow, C.J., dissenting). The majority in Sofie does not address Johanson.

damages to be assessed by a jury." Similar language appears in default provisions pre- and post-dating the 1881 Code. See 1854 Territorial Code § 225; 1869 Territorial Code § 291; 1877 Territorial Code § 293; 1891 Hill Code § 412; 2 Rem. Rev. Stat. § 411; former RCW 4.56.160 (1962). Currently, CR 55(b)(2) only provides for a jury trial to determine damages if required by statute.[9] The Court should conclude that, under Johnanson, there is no constitutional right to a jury trial in a covenant judgment reasonableness hearing.[10]

In the alternative, Farmers argues that it has a constitutional right to trial by jury on the issue of damages in the subsequent bad faith action. See Farmers Pet. for Rev. at 3-4. This action is apparently pending. See Farmers Supp. Br. at 4 n.4. Bird is correct that this claim of entitlement to the right to trial by jury is subject to preclusion principles once those damages represented in the covenant judgment are determined. As a result, there is no issue of fact to which the right to jury trial could attach, to the extent determined in the covenant judgment. See Nielson v.

[9] The cited statutes and CR 55 are set forth in the Appendix to this brief, along with the 1881 Territorial Code §§ 204 & 289. Notably, in Dean, the Oregon Supreme Court dealt with statutes involving similar language to that found in the Washington statutes compiled in the Appendix. The court concluded that the Oregon statutes likewise vested discretion in the court to determine whether it would decide damages or have a jury do so. See Dean, 29 Pac. at 443.

[10] Should the Court disagree with this analysis, it may nonetheless reach the same result by concluding that the covenant judgment reasonableness hearing is equitable in nature. See Schmidt, 115 Wn.2d at 159-61 (concluding similar reasonableness hearing under RCW 4.22.060 is equitable proceeding).

Spanaway Gen. Med. Clinic, 135 Wn.2d 255, 266-69, 956 P.2d 312 (1998); Bird Resp. to Pet. for Rev. at 13-14.[11]

B) Farmers' Due Process Claims Fail Because There Is No Right To A Jury In A Covenant Judgment Reasonableness Hearing, And Because Using The Amount Of A Reasonable Covenant Judgment Settlement As The Presumptive Measure Of Damages In Subsequent Litigation Is Subject To Preclusion Principles.

Farmers' due process argument is two-fold.[12] First, Farmers contends that because of the denial of the right to trial by jury as to the reasonableness hearing, its due process rights are violated. See Farmers Br. at 21-22. If Farmers' jury trial argument is found wanting, this due process argument likewise fails. See Bird, 161 Wn.App. at 524 n.6.

Farmers next contends that its due process rights are violated because the covenant judgment sets a presumptive measure of damages for those damages embodied in the covenant judgment settlement. See Farmers Supp. Br. at 15-16. This argument fails for two reasons. First, Farmers participated fully in the reasonableness hearing conducted in this case, and does not otherwise challenge the procedural fairness of that proceeding. See Bird at 524 n.6.

Second, Farmers is bound to the covenant judgment entered in the underlying tort litigation by principles of preclusion. See T&G Constr.,

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[11] Of course, liability on the insurance bad faith claim and other damages issues are not encompassed by the covenant judgment and would properly be subject to trial by jury.

[12] Washington Constitution Art. I § 3 governs due process. The text of this provision is reproduced in the Appendix to this brief. Farmers does not cite this provision, and appears to rely on federal due process analysis under the U.S. Constitution, Amends. 5 & 14. See Farmers Supp. Br. at 15-16. As Farmers does not argue that Art. I § 3 requires a more searching analysis, this brief assumes for purposes of argument that the due process standards under the state and federal constitutions are the same.

165 Wn.2d at 263 (extending the preclusion principles applied in Fisher v. Allstate Ins. Co., 136 Wn.2d 240, 961 P.2d 350 (1998), and Lenzi v. Redland Ins. Co., 140 Wn.2d 267, 996 P.2d 603 (2000), involving underinsured motorist insurance claims). Due process is not abridged by application of preclusion principles. See Fisher, 136 Wn.2d at 251 (noting due process is satisfied by notice and opportunity to intervene in underlying action; quoting Briggs v. American Family Mut. Ins. Co., 833 P.2d 859, 864 (Colo. App. 1992)); see also Pederson v. Potter, 103 Wn.App. 62, 74 n.1, 11 P.3d 833 (2000) (giving res judicata effect to judgment by confession does not offend due process), *review denied*, 143 Wn.2d 1006 (2001); Simpson Timber Co. v. Aetna Cas. & Sur. Co., 19 Wn.App. 535, 540, 576 P.2d 437 (1978) (holding application of collateral estoppel against a stranger to the prior adjudication who has the motive and opportunity to fully and fairly present its case does not offend due process), *review denied*, 91 Wn.2d 1013 (1979); Bunce Rental, Inc. v. Clark Equip. Co., 42 Wn.App. 644, 713 P.2d 128 (1986) (holding application of collateral estoppel against co-defendant who was not in an adverse relationship in underlying litigation, but who had opportunity to fully and fairly present its case, does not offend due process).

VI. CONCLUSION

The Court should adopt the analysis advanced in this brief and resolve the issues addressed accordingly.

DATED this 23rd day of December, 2011.

for BRYAN P. HARNETIAUX, and
for GARY N. BLOOM
with authority

GEORGE M. AHREND

On behalf of
WSAJ Foundation

Appendix

Washington Constitution, Article I, § 3. Personal Rights

No person shall be deprived of life, liberty, or property, without due process of law.

Washington Constitution, Article I, § 21. Trial by Jury

The right of trial by jury shall remain inviolate, but the legislature may provide for a jury of any number less than twelve in courts not of record, and for a verdict by nine or more jurors in civil cases in any court of record, and for waiving of the jury in civil cases where the consent of the parties interested is given thereto.

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XX. OF NEW TRIAL.

SEC. 215. A new trial defined.
216. For what causes a new trial may be granted.
217. When facts on application for a new trial shall be stated by affidavit; when on a written statement.
218. When motions for a new trial shall be made.
219. When counter affidavits may be filed.

SEC. 215. A new trial is a re-examination of an issue, in the same court after a trial and decision by a jury, court or referees.

SEC. 216. The former verdict or other decision may be vacated and a new trial granted on the application of the party aggrieved for any of the following causes, materially affecting the substantial rights of such party:

1st. Irregularity in the proceedings of the court, jury or adverse party, or any order of the court, or abuse of discretion by which such party was prevented from having a fair trial;

2d. Misconduct of the jury or prevailing party;

3d. Accident or surprise, which ordinary prudence could not have guarded against.

4th. Newly discovered evidence, material for the party making the application, which he could not with reasonable diligence have discovered and produced at the trial;

5th. Excessive damages, appearing to have been given under the influence of passion or prejudice;

6th. Insufficiency of the evidence to justify the verdict or other decision, or that it is against law.

SEC. 217. When the application is made for a cause mentioned in the first, second, third and fourth subdivisions of the last preceding section, the facts upon which it is based shall be made to appear by affidavit. For any other cause it shall be made upon a written statement.

SEC. 218. Notice of an intended motion for new trial, shall be given on the day when the verdict is rendered, or within two days thereafter; and all motions shall be made during the term at which a cause is tried, unless for good cause the court allow further time.

SEC. 219. If the application be made upon affidavits filed, the adverse party may use counter affidavits on the hearing; but such counter affidavits shall be filed with the clerk previous to the hearing.

XXI. JUDGMENT IN GENERAL.

SEC. 220. A judgment defined.
221. Against whom a judgment may be given, and the extent thereof.
222. In actions against several defendants the court may separate the judgment.
223. When an action may be dismissed, or a non-suit entered.
224. In all other cases judgment to be rendered on its merits.

SEC. 220. A judgment is the final determination of the rights of the parties in the action.

SEC. 221. Judgment may be given for one or more of several plaintiffs, and for or against one or more of several defendants; and it may, when the justice of the case requires it, determine the ultimate rights of the parties on each side as between themselves.

SEC. 222. In an action against several defendants, the court may, in its discretion render judgment against one or more of them, whenever a several judgment is proper, leaving the action to proceed against the others.

SEC. 223. An action may be dismissed, or a judgment of non-suit entered in the following cases:

1st. By the plaintiff himself, at any time, either in term time or in vacation, before the jury retire to consider of their verdict, unless set-off be interposed as a defense, or unless the defendant sets up a counter claim to the specific property or thing which is the subject matter of the action;

2d. By either party, upon the written consent of the other;

3d. By the court, when the plaintiff fails to appear on the trial, and the defendant appears and asks for the dismissal;

4th. By the court, when upon the trial and before the final submission of the case, the plaintiff abandons it;

5th. By the court, on the refusal or neglect of the plaintiff to make the necessary parties, after having been ordered by the court;

6th. By the court, on the application of some of the defendants, where there are others, whom the plaintiff fails to prosecute with diligence.

7th. By the court, for disobedience by the plaintiff, of an order concerning the proceedings in the action.

8th. By the court, upon notice of the defendant, when upon the trial the plaintiff fails to prove a sufficient cause for the jury.

SEC. 224. In every case, other than those mentioned in the last section, the judgment shall be rendered on the merits.

XXII. JUDGMENT UPON A FAILURE TO ANSWER.

SEC. 225. When judgment may be had on failure to answer.

SEC. 225. Judgment may be had on proof of the service of the summons and complaint, if the defendant fail to answer the complaint, as follows:

1st. In an action arising upon a contract for the recovery of money only, if no answer be filed with the clerk of the court, within the time prescribed by law, or such further time as may have been granted, the court, at its next term, upon the application of the plaintiff, may direct the clerk

to enter the default of the defendant, and immediately thereafter enter judgment for the amount mentioned in the summons, including the costs, against the defendant, or against one or more of several defendants, in the cases provided for in section forty-three of this act.

2d. In other actions, if no answer be filed with the clerk of the court within the time prescribed by law, or such further time as may have been granted, the court shall, in like manner, direct the clerk to enter the default of the defendant; and thereafter the plaintiff may apply at that, or any subsequent term of the court, for the relief demanded in the complaint.—If the taking of an account, or other proof of any fact, be necessary to enable the court to give judgment, or to carry the judgment into effect, the court may take the account, or hear the proof, or may, in its discretion, order a reference for that purpose. And when the action is for the recovery of damages only, or of specific, real, or personal property, with damages for the withholding thereof, the court may order the damages to be assessed by a jury, or, if to determine the amount of damages, the examination of a long account be necessary, by a reference, as above provided.

3d. In actions where the service of the summons shall be by publication, the plaintiff may in like manner apply for judgment, and the court shall thereupon require proof to be made of the demand mentioned in the complaint, and if the defendant be not a resident of the territory, shall require the plaintiff or his agent to be examined, on oath, respecting any payments that have been made to the plaintiff, or to any one for his use, on account of such demand, and may render judgment for the amount which he is entitled to recover. Before rendering judgment, the court may, in its discretion, require the plaintiff to cause to be filed satisfactory security to abide the order of the court, touching the restitution of any property, collected or received under the judgment, in case the defendant, or his representatives shall be admitted to defend the action, and succeed in the defence.

4th. The court may, in its discretion, before final judgment, set aside any default upon affidavit, showing good and sufficient cause, and upon such terms as may be deemed reasonable.

XXIII. OF JUDGMENT BY CONFESSION.

Sec. 226. How judgment by confession may be had.
227. Plaintiff shall make oath that the amount confessed is actually due.
228. Judgments by confession shall have the same effect as other judgments.

Sec. 226. Any defendant may appear in court, in person or by attorney, duly authorized, in writing, and confess judgment for any amount due or owing by him, and such confession shall be a waiver of all errors for want of service or complaint. When made upon a written power of attorney, the execution thereof shall be proved to the satisfaction of the court, and the power of attorney filed with the clerk.

Sec. 227. In all cases, the plaintiff or his attorney shall make oath that the amount for which the judgment is taken is actually due, and that the confession is not made by collusion with the defendant, or for the purpose of hindering, defeating, or defrauding any creditors of the defendant.

Sec. 228. Judgments by confession shall have the effect of ordinary judgments, from the day on which they are rendered.

XXIV. OF THE MANNER OF TAKING AND ENTERING JUDGMENT.

Sec. 229. Judgments shall be in conformity to the verdict.
230. When the case is reserved, either party may bring it before the court.
231. Judgments for excess may be given.
232. Judgment for possession. Judgment for return.
233. Papers to be kept after judgment.
234. Each clerk to keep an execution docket.
235. What shall be entered in the execution docket.
236 & 237. Further entries in the execution docket.
238. Clerk to make an alphabetical index to the execution docket.
239. Clerk to keep a book of levies; how kept, &c.

Sec. 229. When a trial by jury has been had, judgment shall be entered in conformity to the verdict, at the term during which it is rendered, unless an affidavit or statement of grounds for a new trial shall be filed, or unless the court order the case to be reserved for argument or further consideration, or grant a stay of proceedings.

Sec. 230. When the case is reserved for argument or further consideration, as mentioned in the last section, it may be brought by either party before the court for argument, at the first term thereafter.

Sec. 231. If a set-off, established at the trial, exceed the plaintiff's demand, so established, judgment for the defendant shall be given for the excess; or if it appear that the defendant is entitled to any other affirmative relief, judgment shall be given accordingly.

232. In an action to recover the possession of personal property, judgment for the plaintiff may be for the possession, or the value thereof, in case a delivery cannot be had, and damages for the detention. If the property have been delivered to the plaintiff, and the defendant claim a return thereof, judgment for the defendant may be for a return of the property, or the value thereof, in case a return cannot be had, and damages for taking and withholding the same.

Sec. 233. Immediately after entering the judgment, the clerk shall attach together all the papers in the case, and carefully keep them in his office.

Sec. 234. Every clerk shall keep in his office a well bound book, to be

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STATUTES

OF THE

TERRITORY OF WASHINGTON,

MADE AND PASSED

AT A SESSION OF THE LEGISLATIVE ASSEMBLY BEGUN AND HELD AT OLYMPIA ON THE FOURTH DAY OF OCTOBER, 1869, AND ENDED ON THE SECOND DAY OF DECEMBER, 1869.

NINETY-FOURTH YEAR OF INDEPENDENCE.

PUBLISHED BY AUTHORITY.

OLYMPIA:
JAMES RODGERS, PRINTER.
1869.

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2. By either party upon the written consent of the other.

3. By the court, when the plaintiff fails to appear on trial and the defendant appears and asks for a dismissal.

4. By the court, when upon the trial and before the final submission of the case the plaintiff abandons it.

5. By the court, on the refusal or neglect of the plaintiff to make the necessary parties after having been ordered by the court.

6. By the court, on the application of some of the defendants, where there are others whom the plaintiff fails to prosecute with diligence.

7. By the court, for disobedience of the plaintiff to an order concerning the proceedings in the action.

8. By the court, upon motion of the defendant, when upon the trial the plaintiff fails to prove a sufficient cause for the jury.

SEC. 289. In every case other than those mentioned in the last section, the judgment shall be rendered on the merits.

SEC. 290. When a judgment of non-suit is given, the action is dismissed; but such judgment shall not have the effect to bar another action for the same cause.

CHAPTER XXIV.

JUDGMENT ON FAILURE TO ANSWER.

SEC. 291. Judgment may be had on proof of the service of the complaint and notice, if the defendant fail to answer the complaint as follows:

1. In an action arising upon a contract for the recovery of money only, if no answer be filed with the clerk of the court within the time prescribed by law, or such further time as may have been granted, the court upon the application of the plaintiff may direct the clerk to enter the default of the defendant and immediately thereafter enter judgment for the amount mentioned in the complaint, including the costs against the defendant, or against one or more of the several defendants, in the cases provided for in section sixty-seven of this act.

2. In other actions, if no answer be filed with the clerk of the court within the time prescribed by law or such further time as may have been granted, the court shall in like manner direct the clerk to enter the default of the defendant; and thereafter the plaintiff may apply at that or any subsequent term of the court for the relief demanded in the complaint. If the taking of an account or other proof of any fact be necessary to enable the court to give judgment or to carry the judgment into effect, the court may take the account, or hear the proof, or may, in its discretion, order a reference for that purpose. And when the action is for the recovery of damages only, or of specific, real, or personal property, with damages for the withholding thereof, the court may order the damages to be assessed by a jury; or if to determine the amount of damages the examination of a long account be necessary, by a reference, as above provided.

3. When the defendant has answered and admits the plaintiff's claim, but sets up a counter claim amounting to less than the plaintiff's claim, the plaintiff, on motion, shall have judgment for the excess of his claim over such counter claim, as for want of answer thereto.

4. In actions when the service shall be by publication, the plaintiff may in like manner apply for judgment, and the court shall thereupon require proof to be made of the demand mentioned in the complaint, and if the defendant be not a resident of the Territory, shall require the plaintiff or his agent to be examined on oath respecting any payments that have been made to the plaintiff, or to any one for his use on account of such demand, and may render judgment for the amount which he is entitled to recover. Before rendering judgment the court may, in its discretion, require the plaintiff to cause to be filed satisfactory security to abide the order of the court touching the resti-

tution of any property collected or received under the judgment, in case the defendant or his representatives shall be admitted to defend the action and succeed in the defense.

SEC. 292. The court may, in its discretion, before final judgment, set aside any default, upon affidavit showing good and sufficient cause, and upon such terms as may be deemed reasonable.

CHAPTER XXV.

JUDGMENT BY CONFESSION.

SEC. 293. On the confession of the defendant, with the assent of the plaintiff or his attorney, judgment may be given against the defendant in any action before or after answer, for any amount or relief not exceeding or different from that demanded in the complaint.

SEC. 294. When the action is against the Territory, a county or other public corporation therein, or a private corporation, or a minor, the confession shall be made by the person who at the time sustains the relation to such Territory, corporation, county or minor, as would authorize the service of a notice upon him; or in case of a minor, if a guardian for the action has been appointed, then by such guardian. In all other cases, the confession shall be made by the defendant in person.

SEC. 295. When the action is upon a contract and against one or more defendants jointly liable, judgment may be given on the confession of one or more defendants against all the defendants thus jointly liable, whether such defendants have been served or not, to be enforced only against their joint property and against the joint and separate property of the defendant making the confession.

SEC. 296. The confession and assent thereto shall be in writing and subscribed by the parties making the same, and

acknowledged by each before some officer authorized to take acknowledgments of deeds; but such acknowledgment is not required when the parties shall appear in court when the judgment is given, or before the clerk in vacation by whom the judgment is entered. In all cases the confession and assent thereto and the acknowledgment, if any, shall be filed with the clerk.

SEC. 297. A judgment by confession may be entered without action, either for money due or to become due, or to secure any person against contingent liability on behalf of the defendant, or both, in the manner prescribed by this chapter.

SEC. 298. A statement in writing shall be made, signed by the defendant and verified by his oath to the following effect:

1. It shall authorize the entry of judgment for a specified sum.

2. If it be for money due or to become due, it shall state concisely the facts out of which it arose, and shall show that the sum confessed therefor is justly due or to become due.

3. If it be for the purpose of securing the plaintiff against a contingent liability, it shall state concisely the facts constituting the liability, and shall show that the sum confessed therefor does not exceed the same.

SEC. 299. The statement shall be filed with the clerk of the court in which the judgment is to be entered, who shall indorse upon it and enter in the judgment book a judgment of such court for the amount confessed, with ten dollars costs. The statement and affidavit, with the judgment endorsed, shall thereupon become the judgment roll.

CHAPTER XXVI.

SUBMITTED CASES.

SEC. 300. Parties to a question in difference which might be the subject of a civil action may, without action, agree upon

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LAWS

OF THE

TERRITORY OF WASHINGTON

ENACTED BY THE

LEGISLATIVE ASSEMBLY,

IN THE YEAR 1877.

Published by Authority.

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1877.

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SEC. 289. Judgment may be given for or against one or more of several plaintiffs and for or against one or more of several defendants; and it may when the justice of the case requires it, determine the ultimate rights of the parties on each side as between themselves.

SEC. 288. In an action against several defendants the court may, in its discretion, render judgment against one or more of them whenever a several judgment is proper, leaving the action to proceed against the others.

CHAPTER XXIII.

JUDGMENT OF NON-SUIT.

SEC. 290. An action may be dismissed or a judgment of non-suit entered in the following cases:

1. By the plaintiff himself at any time, either in term time or in vacation, before the jury retire to consider their verdict, unless set-off be interposed as a defense, or unless the defendant sets up a counter claim to the specific property or thing which is the subject matter of the action.

2. By either party upon the written consent of the other.

3. By the court, when the plaintiff fails to appear on trial and the defendant appears and asks for a dismissal.

4. By the court, when upon the trial and before the final submission of the case the plaintiff abandons it.

5. By the court, on the refusal or neglect of the plaintiff to make the necessary parties after having been ordered by the court.

6. By the court, on the application of some of the defendants, where there are others whom the plaintiff fails to prosecute with diligence.

7. By the court, for disobedience of the plaintiff to an order concerning the proceedings in the action.

8. By the court, upon motion of the defendant, when upon the trial the plaintiff fails to prove a sufficient cause for the jury.

SEC. 291. In every case other than those mentioned in the last section, the judgment shall be rendered on the merits.

SEC. 292. When a judgment of non-suit is given, the action is dismissed; but such judgment shall not have the effect to bar another action for the same cause.

CHAPTER XXIV.

JUDGMENT ON FAILURE TO ANSWER.

IN WHAT CASE JUDGMENT MAY BE HAD UPON FAILURE TO ANSWER.

SEC. 293. Judgment may be had if the defendant fail to answer to the complaint, as follows:

1. In any action arising on contract for the recovery of money only the plaintiff may file with the clerk proof of personal service of the summons and complaint on one more of the defendants. The court shall thereupon enter judgment for the amount claimed against the defendant or defendants or against one more of the several defendants in the cases provided for in section sixty-nine. Where the defendant by his answer in any such action shall not deny the plaintiff's claim but shall set up a counter claim amounting to less than the plaintiff's claim judgment may be had by the plaintiff for the excess of said claim over the said counter claim in like manner in any such action, upon the plaintiff's filing with the clerk of the court a statement admitting such counter claim.

2. In other actions the plaintiff may upon the like proof apply to the court after the expiration of the time for answering, for the relief demanded in the complaint. If the taking of an account or of the proof of any fact be necessary to enable the court to give judgment or to carry the judgment into effect the court may take the account or hear the proof, or may, in its discretion, order a reference for that purpose. Where the action is for the recovery of damages, in whole or in part, the court may order the damages to be assessed by a jury; or if to determine the amount of damages, the examination of a long account be necessary, by a reference as above provided. If the defendant give notice of appearance in the action before the expiration of the time for answering he shall be entitled to five days notice of the time and place of application to the court for the relief demanded in the complaint.

3. In action where the service of the summons was by publication, the plaintiff upon the expiration of the time for answer-

ing may upon proof of service by publication apply for judgment and the court must thereupon require proof of the demand mentioned in the complaint and must require the plaintiff or his agent to be examined on oath respecting any payments that have been made to the plaintiff or to any one for his use on account of such demand and may render judgment for the amount which he is entitled to recover or for such other relief as he may be entitled to

SEC. 294. The court may, in its discretion, before final judgment, set aside any default, upon affidavit showing good and sufficient cause, and upon such terms as may be deemed reasonable.

CHAPTER XXV.

JUDGMENT BY CONFESSION.

SEC. 295. On the confession of the defendant, with the assent of the plaintiff or his attorney, judgment may be given against the defendant in any action before or after answer, for any amount or relief not exceeding or different from that demanded in the complaint.

SEC. 296. When the action is against the Territory, a county or other public corporation therein, or a private corporation, or a minor, the confession shall be made by the person who at the time sustains the relation to such Territory, corporation, county or minor, as would authorize the service of a notice upon him; or in case of a minor, if a guardian for the action has been appointed, then by such guardian. In all other cases, the confession shall be made by the defendant in person.

SEC. 297. When the action is upon a contract and against one or more defendants jointly liable, judgment may be given on the confession of one or more defendants against all the defendants thus jointly liable, whether such defendants have been served or not, to be enforced only against their joint property and against the joint and separate property of the defendant making the confession.

SEC. 298. The confession and assent thereto shall be in writing and subscribed by the parties making the same, and acknowledged by each before some officer authorized to take acknowledgements of deeds.

SEC. 299. A judgment by confession may be entered

without action, either for money due or to become due, or to secure any person against contingent liability on behalf of the defendant, or both, in the manner prescribed by this chapter.

SEC. 300. A statement in writing shall be made, signed by the defendant and verified by his oath to the following effect:

1. It shall authorize the entry of judgment for a specified sum.

2. If it be for money due or to become due, it shall state concisely the facts out of which it arose, and shall show that the sum confessed therefor is justly due or to become due.

3. If it be for the purpose of securing the plaintiff against a contingent liability, it shall state concisely the facts constituting the liability, and shall show that the sum confessed therefor does not exceed the same.

SECTION 301. The statement must be presented to the district court or a judge thereof and if the same be found sufficient, the court or judge shall endorse thereon an order that judgment be entered by the clerk whereupon it may be filed in the office of the clerk who shall enter a judgment for the amount confessed with costs. Execution may be issued and enforced thereon in the same manner as upon judgments in other cases.

CHAPTER XXVI.

SUBMITTED CASES.

SEC. 302. Parties to a question in difference which might be the subject of a civil action may, without action, agree upon a case containing the facts upon which the controversy depends, and present a submission of the same to any court which would have jurisdiction if an action had been brought. But it must appear by affidavit that the controversy is real and the proceedings in good faith to determine the rights of the parties. The court shall thereupon hear and determine the case and render judgment thereon as if an action were pending.

SEC. 303. Judgment shall be entered in the judgment book as in other cases, but without costs for any proceedings prior to the trial. The case, the submission and a copy of the judgment shall constitute the judgment roll.

SEC. 304. The judgment may be enforced in the same

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REVISED AND AMENDED BY THE LEGISLATIVE ASSEMBLY OF THE TERRITORY OF WASHINGTON, DURING THE EIGHTH BIENNIAL SESSION, AND THE EXTRA SESSION, ENDING DECEMBER 7, 1881; THE CONSTITUTION OF THE UNITED STATES AND AMENDMENTS THERETO; THE ACTS OF CONGRESS APPLICABLE TO THE TERRITORY OF WASHINGTON; AND THE NATURALIZATION LAWS.

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the court, execute a bond to such person as the court may direct, cond tioned that he will faithfully discharge the duties of receiver in the a tion, and obey the orders of the court therein.

SEC. 195. When it is admitted by the pleading or examination of party, that he has in his possession, or under his control, any money, other thing capable of delivery, which being the subject of the litigatio is held by him as trustee for another party, or which belongs or is d to another party, the court may order the same to be deposited in cou or delivered to such party, with or without security, subject to the fu ther direction of the court.

SEC. 196. Whenever, in the exercise of its authority, a court shall ha ordered the deposit or delivery of money or other thing, and the ord is disobeyed, the court, besides punishing the disobedience as for co tempt, may make an order requiring the sheriff to take the money thing, and deposit or deliver it, in conformity with the direction of th court.

SEC. 197. Money deposited, or paid into a court in an action, shall n be loaned out, unless, with the consent of all parties having an intere in, or making claim to the same.

SEC. 198. The receiver shall have power, under control of the cou to bring and defend actions, to take and keep possession of the proper to receive rents, collect debts, and generally to do such acts respectin the property, as the court may authorize.

SEC. 199. When the answer of the defendant admits part of the pla tiff's claim to be just, the court, on motion, may order the defendant satisfy that part of the claim, and may enforce the order by execution attachment.

CHAPTER XIV.

OF ISSUES IN CIVIL ACTIONS.

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200. Issues arise, when. Are of two kinds.
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202. Issues of fact.
203. Issues of law and fact in same action; law first tried.

SEC. 200. Issue arises upon the pleading when a fact or conclusio of law is maintained by the one party, and controverted by the other, a are of two kinds:

1. Of law; and
2. Of fact.

SEC. 201. An issue of law arises upon a demurrer to the complai answer, or reply, or to some part thereof.

SEC. 202. An issue of fact arises:

1. Upon a material allegation in the complaint, controverted by t answer; or

2. Upon new matter or a set-off, controverted by the reply; or

3. Upon new matter in the reply.

SEC. 203. Issues both of law and fact may arise upon different parts the pleading in the same action. In such cases, the issues of law sh be first tried, unless the court otherwise direct.

CHAPTER XV.

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SEC. 204. An issue of law shall be tried by the court, unless referred as provided in this chapter. An issue of fact shall be tried by a jury, unless a jury trial be waived, or a reference be ordered, as provided in this chapter. The waiver of a jury, or agreement to refer, shall be by stipulation of the parties filed, or the oral consent of parties given in open court and entered in the records: *Provided*, That nothing herein contained shall be so construed as to restrict the chancery powers of the judges, or to authorize the trial of any issue by a jury, when the complaint alleges an equitable claim, and seeks relief solely upon the ground of the equities of the demand made by the pleadings in the action.

SEC. 205. A motion to continue a trial on the ground of the absence of evidence, shall only be made upon affidavit, showing the materiality of the evidence expected to be obtained, and that due diligence has been used to procure it, and also the name and residence of the witness or witnesses. The court may also require the moving party to state, upon affidavit the evidence which he expects to obtain; and if the adverse party admit that such evidence would be given, and that it be consided as actual given on the trial, or offered and overruled as improper, the trial shall not be continued. The court, upon its allowance of the motion, may impose terms or conditions upon the moving party.

SEC. 206. When the action is called for trial, the clerk shall prepare separate ballots, containing the names of the jurors summoned, who have appeared and not been excused, and deposit them in a box. He shall then draw from the box twelve names, and the persons whose names are drawn shall constitute the jury. If the ballots become exhausted, before the jury is complete, or if from any cause, a juror or jurors be excused or discharged, the sheriff, under the direction of the court, shall summon from the bystanders, citizens of the county or district, as many qualified persons as may be necessary to complete the jury. Whenever it shall be requisite for the sheriff to summon more than one person at a time from the bystanders or body of the district or county, the names of the talesmen shall be returned to the clerk, who shall thereupon write the names upon separate ballots and deposit the same in the trial jury box, and draw such ballots separately therefrom, as in the case of the regular panel. The jury shall consist of twelve persons, unless the parties con-

4. By the court, when upon the trial and before the final submission of case, the plaintiff abandons it.

5. By the court, on the refusal or neglect of the plaintiff to make the necessary parties, after having been ordered by the court.

6. By the court, on the application of some of the defendants, where there are others whom the plaintiff fails to prosecute with diligence.

7. By the court, for disobedience of the plaintiff to an order concerning the proceedings in the action.

8. By the court, upon motion of the defendant, when upon the trial the plaintiff fails to prove a sufficient cause for the jury.

SEC. 287. In every case other than those mentioned in the last section the judgment shall be rendered on the merits.

SEC. 288. When a judgment of non-suit is given, the action is dismissed; but such judgment shall not have the effect to bar another action for the same cause.

CHAPTER XXIV.

JUDGMENT ON FAILURE TO ANSWER. IN WHAT CASE JUDGMENT MAY BE HAD UPON FAILURE TO ANSWER.

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289. In actions on contacts for payment of money only, defaults and proceedure.
289. In actions for other relief and for damages.
289. Where service is by publication.
290. Court may set aside default, when.

SEC. 289. Judgment may be had if the defendant fail to answer to the complaint, as follows:

1. In any action arising on contract for the recovery of money only the plaintiff may file with the clerk proof of personal service of the summons and complaint on one or more of the defendants. The court shall thereupon enter judgment for the amount claimed, against the defendant or defendants, or against one or more of the several defendants in the cases provided for in section sixty-eight. Where the defendant, by his answer, in any such action, shall not deny the plaintiff's claim, but shall set up a counter claim amounting to less than the plaintiff's claim, judgment may be had by the plaintiff for the excess of said claim over the said counter claim.

2. In other actions the plaintiff may, upon the like proof, apply to the court after the expiration of the time for answering, for the relief demanded in the complaint. If the taking of an account, or of the proof of any fact be necessary to enable the court to give judgment, or to carry the judgment into effect, the court may take the account or hear the proof, or may, in its discretion, order a reference for that purpose. Where the action is for the recovery of damages, in whole or in part, the court may order the damages to be assessed by a jury; or if to determine the amount of damages, the examination of a long account be necessary, by a reference as above provided. If the defendant give notice of appearance in the action, before the expiration of the time for answering, he shall be entitled to five days' notice of the time and place of application to the court for the relief demanded in the complaint.

3. In action where the service of the summons was by publication the plaintiff, upon the expiration of the time for answering, may, upon proof of service by publication, apply for judgment; and the court must

upon require proof of the demand mentioned in the complaint, and must require the plaintiff or his agent to be examined on oath respecting any payments that have been made to the plaintiff, or to any one for the use on account of such demand, and may render judgment for the amount which he is entitled to recover, or for such other relief as he may be entitled to.

SEC. 290. The court may, in its discretion, before final judgment, set aside any default, upon affidavit showing good and sufficient cause, and upon such terms as may be deemed reasonable.

CHAPTER XXV.

JUDGMENT BY CONFESSION.

SECTION
291. When may be given.
292. How corporations or minors can confess judgment.
293. When by one of several defendants, jointly liable.
294. Requisites of confession of.
295. May be entered without action, in what cases.
296. Statement to be verified; what shall contain.
297. To be presented to judge and endorsed by him; further proceedings.

SEC. 291. On the confession of the defendant, with the assent of the plaintiff or his attorney, judgment may be given against the defendant in any action before or after answer, for any amount or relief not exceeding or different from that demanded in the complaint.

SEC. 292. When the action is against the Territory, a county or other public corporation therein, or a private corporation, or a minor, the confession shall be made by the person who at the time sustains the relation to such Territory, corporation, county or minor, as would authorize the service of a notice upon him; or in the case of a minor, if a guardian for the action has been appointed, then by such guardian; in all other cases the confession shall be made by this defendant in person.

SEC. 293. When the action is upon a contract and against one or more defendants jointly liable, judgment may be given on the confession of one or more defendants, against all the defendants thus jointly liable, whether such defendants have been served or not, to be enforced only against their joint property and against the joint and separate property of the defendant making the confession.

SEC. 294. The confession and assent thereto shall be in writing and subscribed by the parties making the same, and acknowledged by each before some officer authorized to take acknowledgments of deeds.

SEC. 295. A judgment by confession may be entered without action, either for money due or to become due, or to secure any person against contingent liability on behalf of the defendant, or both, in the manner prescribed by this chapter.

SEC. 296. A statement in writing shall be made, signed by the defendant and verified by his oath, to the following effect:

1. It shall authorize the entry of judgment for a specified sum.

2. If it be for money due or to become due, it shall state concisely the facts out of which the indebtedness arose, and shall show that the sum confessed to be due, is justly due or to become due.

3. If it be for the purpose of securing the plaintiff against a contingent liability, it shall state concisely the facts constituting the liability, and show that the sum confessed therefor does not exceed the same.

SEC. 297. The statement must be presented to the district court or a

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A defendant usually demurs or proceeds under § 409; but it is said that if plaintiff admits on the pleadings facts showing that he has no cause of action against defendant, the court may order judgment for defendant (on the pleadings?). There was a question on the subject of replication in this case: *Mulford* v. *Estudillo*, 32 Cal. 136. When the cause is called for trial, defendant may move to have the action dismissed, if the complaint does not state a cause of action and the plaintiff refuses to amend: *King* v. *Montgomery*, 50 Cal. 115. Where the plaintiff has a good cause of action, which, by accident or mistake, he has failed to set out in his complaint, the court, on a motion for judgment on the pleadings, should, on his application so to do, permit him to amend; but if he fail to make such an application, the defendant is entitled to judgment on the pleadings: *Kelley* v. *Kriess*, 58 Cal. 210. On an appeal from the judgment, where there is no bill of exceptions, the ruling of the court on motion for judgment on the pleadings cannot be reviewed: *Hemme* v. *Hays*, 55 Cal. 337.

Effect of judgment of nonsuit.

§ 411. [288.] When a judgment of nonsuit is given, the action is dismissed; but such judgment shall not have the effect to bar another action for the same cause.

Judgment of nonsuit does not determine the rights of the parties, and neither bars a new action nor is of any weight as evidence therein: *Manhattan L. Ins. Co.* v. *Broughton*, 109 U. S. 121; *Homer* v. *Brown*, 16 How. 354; *Haldeman* v. *United States*, 91 U. S. 584. After the testimony is in on both sides, if the complaint is dismissed because the plaintiff has failed to produce evidence enough to maintain the issue on his part, it will be no bar to another action for the same cause: *Wheeler* v. *Buckman*, 51 N. Y. 391. But a dismissal of the plaintiff's suit upon the merits is as conclusive upon the rights of the parties as any other judgment that might have been rendered in the case: *Parrish* v. *Ferris*, 2 Black, 606; *Durant* v. *Essex Co.*, 7 Wall. 107; *Case* v. *New Orleans etc. Co.*, 101 U. S. 688.

CHAPTER X.

OF JUDGMENT ON FAILURE TO APPEAR AND ANSWER.

§ 412. Judgment for want of answer in actions for recovery of money.
§ 413. Court may set aside default.

Judgment for want of answer in actions for recovery of money.

§ 412. [289.] Judgment may be had if the defendant failed to answer to the complaint, as follows:—

1. In any action arising on contract for the recovery of money only, the plaintiff may file with the clerk proof of personal service of the summons and complaint on one or more of the defendants. The court shall thereupon enter judgment for the amount claimed against the defendant or defendants, or against one or more of the several defendants, in the cases provided for in section sixty-eight. Where the defendant, by his answer, in any such action, shall not deny the plaintiff's claim, but shall set up a counterclaim amounting to less than the plaintiff's claim, judgment may be had by the plaintiff for the excess of said claim over the said counterclaim.

2. In other actions the plaintiff may, upon the like proof, apply to the court after the expiration of the time for answering, for the relief demanded in the complaint. If the taking of an account or of the proof of any fact be necessary to enable the court to give judgment, or to carry the judgment into effect, the court may take the account or hear the proof, or may, in its discretion, order a reference for that purpose. Where the action is for the recovery of damages, in whole

or in part, the court may order the damages to be assessed by a jury; or if to determine the amount of damages the examination of a long account be necessary, by a reference as above provided. If the defendant give notice of appearance in the action before the expiration of the time for answering, he shall be entitled to five days' notice of the time and place of application to the court for the relief demanded in the complaint.

3. In an action where the service of the summons was by publication, the plaintiff, upon the expiration of the time for answering, may, upon proof of service by publication, apply for judgment; and the court must thereupon require proof of the demand mentioned in the complaint, and must require the plaintiff or his agent to be examined on oath respecting any payments that have been made to the plaintiff, or to any one for his use on account of such demand, and may render judgment for the amount which he is entitled to recover, or for such other relief as he may be entitled to.

"Section sixty-eight" is superseded by § 177 of this code.

Judgment on failure to answer.—A defendant, by not answering the complaint, does not admit that plaintiff is entitled to the relief demanded against him, but only that he is entitled to such relief, as the facts, properly alleged, authorize: *Argall* v. *Pitts*, 78 N. Y. 239. A demurrer is an answer within the meaning of this section: *Oliphant* v. *Whitney*, 34 Cal. 25. It is not necessary that a default should be actually entered before judgment is taken. The only purpose of a default is to limit the time during which defendant may answer: *Drake* v. *Dunwick*, 45 Cal. 462. It will be presumed in favor of the judgment by default that the court satisfied itself that the time in which to answer had expired: *Catanich* v. *Hayes*, 52 Cal. 338. However, whether there was an error in entering judgment by default before the expiration of the time for answering may be considered on appeal from the judgment: *Maud* v. *Wear*, 55 Cal. 25. Judgment by default on a complaint which shows no legal cause of action is erroneous: *Abbe* v. *Marr*, 14 Cal. 211; and may be appealed. But if one of several causes of action is imperfectly stated, the plaintiff can take judgment by default on the others. The default admits all material facts: *Hunt* v. *San Francisco*, 11 Cal. 258. A judgment on default for damages where none are prayed for is erroneous although the complaint states facts sufficient to sustain a judgment for damages: *Pitts C. M. Co.* v. *Greenwood*, 29 Cal. 71. A summons radically defective will not support a judgment by default: *State* v. *Woodlief*, 2 Cal. 242. That an insufficient affidavit of service of summons will not support judgment by default, see *Maynard* v. *McCrellish*, 57 Cal. 355; *Howard* v. *Galloway*, 60 Cal. 10; *Weil* v. *Best*, 60 Cal. 603; *Hog's Back M. Co.* v. *New Basil Co.*, 63 Cal. 121, affidavit of service by mail. And the defendant's remedy is either by motion in the court entering the default or by appeal without moving to set the default aside: *Howard* v. *Galloway*, 60 Cal. 10; *Hallock* v. *Jandin*, 34 Cal. 172, reversing earlier cases. A judge cannot refuse the right of judgment by default accorded by law to the plaintiff: *State* v. *Posey*, 87 Am. Dec. 525.

Plaintiff took judgment by default against *George* Mott; afterwards he obtained an order amending the name to *Gordon*. The supreme court held it error, and reversed the judgment: *McNally* v. *Mott*, 3 Cal. 235. Judgment against *John* Cox, service being returned upon *James* Cox, there being nothing in the record to identify the party, is error: *Sutter* v. *Cox*, 6 Cal. 415. But judgment against D. C. *Seaver*, on a published summons to D. C. *Seavers*, was held good: *Seaver* v. *Fitzgerald*, 23 Cal. 92. If persons are served who are not named in the complaint, by real or fictitious names, it is error to render judgment against them by default: *Lamping & Co.* v. *Hyatt*, 27 Cal. 99. Where the sheriff returned service on "John Doe *alias Westfall*," Westfall, by not appearing, was held to have admitted his identity, and the judgment was good: *Curtis* v. *Herrick*, 14 Cal. 119. The relief granted cannot exceed that claimed in the complaint: *Bann* v. *Reynolds*, 11 Cal. 19; *Parrott* v. *Den*, 34 Cal. 81; *Gage* v. *Rogers*, 20 Cal. 91; *Lamping* v. *Hyatt*, 27 Cal. 102; *Gautier* v. *English*, 29 Cal. 165; and if it does, the judgment is erroneous, but is not void: *Chase* v. *Christianson*, 41 Cal. 256; and may be amended or modified: *Gamble* v. *Voll*, 15 Cal. 510; *Oakland* v. *Whipple*, 44 Cal. 305; *Bond* v. *Pacheco*, 30 Cal. 530. The relief granted must not be outside the issue: *Lothian* v. *Wood*, 55 Cal. 159. But a plaintiff in ejectment to recover an undivided interest in land may have a recovery of a less undivided interest than that sued for: *Halsey* v. *Martin*, 22 Cal. 645.

Where plaintiff, being entitled to a money judgment, took also judgment foreclosing a mechanic's lien which had expired before suit, the court acted correctly in modifying the judgment so as to make it a money judgment only: *Lacare* v. *Leonard*, 45 Cal. 394. Where on the face of the complaint it appeared that two of the defendants contracted merely as

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Reporter of the Supreme Court of the State of Washington, Author of "Notes on Washington Reports," "Remington's Washington Digest," "Remington's Compiled Statutes of Washington," etc.

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VOLUME II

CODES OF PROCEDURE

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TITLE II.—PROCEDURE IN COURTS OF RECORD
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ings thereon: Seattle Nat. Bank v. Meerwaldt, 8 Wash. 630, 36 Pac. 763; Citizens' Nat. Bank of Dayton v. Columbia County, 23 Wash. 441, 63 Pac. 209; Ernst v. Fox, 26 Wash. 526, 67 Pac. 258; McAvoy v. Jennings, 39 Wash. 109, 81 Pac. 77; Fishburne v. Merchants Bank, 42 Wash. 473, 85 Pac. 38, 7 Ann. Cas. 848; State ex rel. Brown v. Superior Court, 87 Wash. 524, 151 Pac. 1126; Depauw University v. Ankeny, 97 Wash. 451, 166 Pac. 1148.

The denial of defendant's motion for judgment on the pleadings does not entitle the plaintiff to judgment on the pleadings, where, on consideration of the whole record, it is not shown to be entitled thereto: Yakima Hardware Co. v. Strickler, 156 Wash. 369, 286 Pac. 853.

Direction of verdict—
—constitutionality of statute forbidding direction of verdict or nonsuit. 29 A.L.R. 1287.
—court's right to refuse to direct verdict although evidence is uncontradicted. 8 A.L.R. 802.
—direction of verdict in action on policy claimed to have lapsed because of failure to pay premium during seven-year period following disappearance of insured. 75 A.L.R. 637.
—effect of explanatory testimony of witness to deprive other testimony given by him of all probative effect. 66 A.L.R. 1517.
—power of court to direct verdict in action of libel or slander where jury is vested with power to determine law and facts. 51 L.R.A.(N.S.) 369.
—power of trial court to direct verdict at close of opening statement of counsel. 29 L.R.A. (N.S.) 218.
—request by both parties for directed verdict as waiver of submission to jury. 69 A.L.R. 633.
—right of insurer to directed verdict on issue of suicide. 37 A.L.R. 171.
—right of party to have case submitted to jury when his own testimony negatives his right of action or defense. 50 A.L.R. 979.
—right or duty of court to direct verdict where based on testimony of party or interested witness. 72 A.L.R. 27.
Taking case from jury, directing or advising acquittal for insufficiency of evidence in criminal case. 17 A.L.R. 914.

CHAPTER 11

JUDGMENT BY DEFAULT

§ 411. Judgment for failure to answer. Judgment may be had if the defendant fail to answer to the complaint, as follows:—

1. In any action arising on contract for the recovery of money only, the plaintiff may file with the clerk proof of personal service of the summons and complaint on one or more of the defendants. The court shall thereupon enter judgment for the amount claimed against the defendant or defendants, or against one or more of the several defendants, in the cases provided for in section 236. Where the defendant, by his answer, in any such action, shall not deny the plaintiff's claim, but shall set up a counterclaim amounting to less than the plaintiff's claim, judgment may be had by the plaintiff for the excess of said claim over the said counterclaim;

2. In other actions the plaintiff may, upon the like proof, apply to the court after the expiration of the time for answering, for the relief demanded in the complaint. If the taking of an account or

of the proof of any fact be necessary to enable the court to give judgment, or to carry the judgment into effect, the court may take the account or hear the proof, or may, in its discretion, order a reference for that purpose. Where the action is for the recovery of damages, in whole or in part, the court may order the damages to be assessed by a jury; or if to determine the amount of damages the examination of a long account be necessary, by a reference as above provided. If the defendant give notice of appearance in the action before the expiration of the time for answering, he shall be entitled to five days' notice of the time and place of application to the court for the relief demanded in the complaint;

3. In [an] action where the service of the summons was by publication, the plaintiff, upon the expiration of the time for answering, may, upon proof of service by publication, apply for judgment; and the court must thereupon require proof of the demand mentioned in the complaint, and must require the plaintiff or his agent to be examined on oath respecting any payments that have been made to the plaintiff, or to anyone for his use on account of such demand, and may render judgment for the amount which he is entitled to recover, or for such other relief as he may be entitled to. [Cf. L. '54, p. 171, § 225; L. '69, p. 70, § 291; L. '77, p. 59, § 293; Cd. '81, § 289; 2 H. C., § 412.]

Judgment for failure to plead to new matter: See supra, § 278.
Judgment for failure to answer interrogatories: See infra, § 1230.

Cited in 55 Wash. 403, 104 Pac. 608; 129 Wash. 153, 156, 224 Pac. 686, 687; 133 Wash. 8, 233 Pac. 23; 20 F. (2d) 944.

BY DEFAULT: See Remington's Digest, Judgm., §§ 21–34.

§ 21. Requisites and validity—Statutory provisions: Judgment upon failure to answer can be entered, as of course, without proof of the plaintiff's demand, under this section, subdivision 1, only where the summons and complaint have been served upon the defendant, and proof of such service filed with the clerk; and this section is in no way modified or repealed by the act of February 2, 1888: Spokane Falls v. Curry, 2 Wash. 541, 27 Pac. 477.

Findings in default: In an action at law for the recovery of money only, findings of fact and conclusions of law are not required on entry of judgment of default, under this section, nor upon judgment on the pleadings: Waller v. Heinrichs, 133 Wash. 7, 233 Pac. 23.

§ 22. Parties against whom judgment by default may be rendered: Glass v. Buttner, 39 Wash. 296, 81 Pac. 699; Sound Credits Co. v. Powers, 100 Wash. 668, 171 Pac. 1031.

§ 23. Discretion of court: Haynes v. Schwartz Co., 5 Wash. 433, 32 Pac. 220; Douglas v. Badger State Mine, 41 Wash. 266, 83 Pac. 178, 4 L.R.A.(N.S.) 196.

§ 24. Appearance in general: Walla Walla Printing etc. Co. v. Budd, 2 W. T. 336, 5 Pac. 602; Canada Settlers Loan & Trust Co. v. Murray, 20 Wash. 656, 56 Pac. 368; Hayworth v. McDonald, 67 Wash. 496, 121 Pac. 984; Kline Brothers & Co. v. North Coast Fire Ins. Co., 80 Wash. 609, 142 Pac. 7; Freeborn v. Chewelah Copper King Min. Co., 89 Wash. 519, 154 Pac. 1095.

§ 25. Default in pleading—Failure to plead in general: Mason v. McLean, 6 Wash. 31, 32 Pac. 1006; State ex rel. Puget Sound Nat. Bank v. Superior Court, 14 Wash. 686, 45 Pac. 670; Capps v. Frederick, 44 Wash. 38, 86 Pac. 1128; Lawson v. Black Diamond

Coal Min. Co., 44 Wash. 26, 86 Pac. 1120; American Bonding Co. v. Dufur, 49 Wash. 632, 96 Pac. 160; Matson v. Kennecott Mines Co., 101 Wash. 12, 171 Pac. 1040; Hastings v. Hastings, 101 Wash. 653, 172 Pac. 833.

A judgment on personal appearance, after the overruling of defendant's demurrer, and failing to further plead, is a default judgment as if there had been no appearance: Rocke v. McDonald, 136 Wash. 322, 239 Pac. 1015, 44 A.L.R. 444.

§ 26. —— Pendency of motion: Richardson v. Richardson, 43 Wash. 634, 86 Pac. 1069; Washington Dredging & Imp. Co. v. Cannel Coal Co., 45 Wash. 462, 88 Pac. 836.

§ 27. Operation and effect of default —In general: Main v. Johnson, 7 Wash. 321, 35 Pac. 67; General Lith. & Print. Co. v. American Trust Co., 55 Wash. 401, 104 Pac. 608.

§ 28. —— Right to notice of and participation in subsequent proceedings: Norris v. Campbell, 27 Wash. 654, 68 Pac. 339; General Lith. & Print. Co. v. American Trust Co., 55 Wash. 401, 104 Pac. 608; Sound Credits Co. v. Powers, 100 Wash. 668, 171 Pac. 1031; Richman v. Wenaha Co., 74 Wash. 370, 133 Pac. 467; Hofto v. National Cas. Co., 135 Wash. 313, 237 Pac. 726.

§ 29. Waiver of default: Cornell University v. Denny Hotel Co., 15 Wash. 433, 46 Pac. 654; Mount Vernon Nat. Bank v. First Nat. Bank, 104 Wash. 107, 176 Pac. 13.

§§ 30, 31. Relief awarded on judgment by default—Conformity to pleadings: Bank of California v. Dyer, 14 Wash. 279, 44 Pac. 534; Sixth Avenue West, Seattle, In re, 59 Wash. 41, 109 Pac. 1052, Ann. Cas. 1912A, 1047; Anderson v. Burgoyne, 60 Wash. 511, 111 Pac. 777; State ex rel. First National Bank v. Hastings, 120 Wash. 283, 207 Pac. 23; Morgan v. Stag Lumber Co., 124 Wash. 223, 214 Pac. 15; Bates v. Glaser, 130 Wash. 328, 227 Pac. 15.

§ 31–1. Time for taking default: Peirce v. National Bank of Germantown, 44 Wash. 404, 87 Pac. 488.

§ 32. Taking or entry of default: Dexter Horton & Co. v. Sparkman, 2 Wash. 165, 25 Pac. 1070; Proulx v. Stetson & Post Mill Co., 6 Wash. 478, 33 Pac. 1067; Warner v. Miner, 41 Wash. 98, 82 Pac. 1033; Swasey v. Mikkelsen, 65 Wash. 411, 118 Pac. 308.

§ 33. Proof of jurisdictional matters: Twigg v. James, 37 Wash. 434, 79 Pac. 959.

§ 34. Proof of cause of action: Ferguson v. Hoshi, 25 Wash. 664, 66 Pac. 105; Citizens' Nat. Bank of Dayton v. Columbia County, 23 Wash. 441, 63 Pac. 209; Cross v. Johnson, 20 Wash. 124, 54 Pac. 1000; Van Buren v. Peterson, 108 Wash. 697, 185 Pac. 572.

Attorney of defendant, power to withdraw answer and permit default judgment. 33 L.R.A. 515.

Joint parties to contract, default judgment as to one or more as bar to action against others. 1 A.L.R. 1606.

Jury, necessity that it compute damages on default judgment. 15 L.R.A. 614; 20 L.R.A.(N.S.) 1.

Physician's services, judgment by default in action for, as bar to action for malpractice. 49 A.L.R. 553.

Public improvement, prior default judgment as precluding reassessment for. 60 A.L.R. 513.

Relief beyond prayer of complaint, validity of default judgment awarding. 11 L.R.A.(N.S.) 803.

§ 412. Setting aside default. The court may, in its discretion, before final judgment, set aside any default, upon affidavit showing good and sufficient cause, and upon such terms as may be deemed reasonable. [L. '54, p. 171, § 225, subd. 4; L. '69, p. 72, § 292; Cd. '81, § 290; 2 H. C., § 413.]

Cited in 2 Wash. 543, 27 Pac. 477; 6 Wash. 35, 32 Pac. 1006; 39 Wash. 375, 81 Pac. 867.

Attorney's reliance on agreement or supposed agreement of opposing attorney to give notice when case was set for trial as ground for relief from judgment. 69 A.L.R. 1336.

Mental incompetency at time of rendition of judgment by default as ground of attack. 34 A.L.R. 221.

Opening decree of divorce taken by default. L.R.A.1917B, 472.

Opening default, right as affected by character of defense. 61 L.R.A. 746; L.R.A.1916F, 839.

Substituted service, judgment on, as within provision for relief from judgment taken through mistake, surprise, or excusable neglect. 44 A.L.R. 618.

CHAPTER 12

JUDGMENT BY CONFESSION

§ 413. When judgment may be given on confession. On the confession of the defendant, with the assent of the plaintiff or his attorney, judgment may be given against the defendant in any action, before or after answer, for any amount or relief not exceeding or different from that demanded in the complaint. [Cf. L. '54, pp. 172, 173, §§ 226–228; L. '69, p. 72, § 293; Cd. '81, § 291; 2 H. C., § 414.]

Cited in 10 Wash. 501, 39 Pac. 142, 45 Am. St. Rep. 803.

BY CONFESSION: A confession of judgment must be made in strict compliance with the statutory provisions: Puget Sound Nat. Bank of Seattle v. Levy, 10 Wash. 499, 39 Pac. 142, 45 Am. St. Rep. 803.

Nature of confession of judgment: See Remington's Digest, Judgm., § 14; Puget Sound Nat. Bank of Seattle v. Levy, 10 Wash. 499, 39 Pac. 142, 45 Am. St. Rep. 803; Proebstel v. State Ins. Co., 14 Wash. 669, 45 Pac. 308.

§ 16. Statement of facts out of which indebtedness arose: Puget Sound Nat. Bank of Seattle v. Levy, 10 Wash. 499, 39 Pac. 142, 45 Am. St. Rep. 803.

§ 17. Construction and operation of judgment: Connoly v. Cunningham, 2 W. T. 242, 5 Pac. 473; Connoly v. Cunningham, 2 W. T. 251, 5 Pac. 477; Schloss v. State Bank, 4 Wash. 726, 31 Pac. 23.

Collateral security, entering judgment as. 3 A.L.R. 851.

Consent, confession, or default of principal, judgment by, as affecting sureties whose obligations are conditioned upon judicial determination of liability or rights of principal. 51 A.L.R. 1489.

Municipality's power to consent or confess to judgment against itself. 67 A.L.R. 1503.

Power of attorney to confess judgment, death or incompetency of principal as affecting. 44 A.L.R. 1310.

Statute of Limitations as affecting warrant to confess judgment. 21 A.L.R. 774.

Warrant of attorney to confess judgment, judgment entered in sister state under. 40 A.L.R. 441.

§ 414. By corporations and minors. When the action is against the state, a county or other public corporation therein, or a private corporation or a minor, the confession shall be made by the person who, at the time, sustains the relation to such state, corporation, county, or minor as would authorize the service of a notice [summons] upon him; or in the case of a minor, if a guardian for the action has been appointed, then by such guardian; in all other cases,

Note 9

ant voluntarily submitted evidence before asking for it. Hill v Scheer (1929) 153 Wn 119, 279 P 391.

On appeal from judgment of dismissal entered on sustaining challenge to sufficiency of plaintiff's evidence in jury case, supreme court must accept all of appellant's evidence as true and give him most favorable inference which can be drawn therefrom. Hein v Chrysler Corp. (1954) 45 Wn 2d 586, 277 P2d 708.

When supreme court will accept facts.—If trial court, in sustaining challenge to sufficiency of evidence in case tried to the court, weighs evidence and then makes findings of fact setting forth facts it found to be established, supreme court on appeal will accept such findings as established facts in case unless evidence clearly preponderates against them. O'Brien v Schultz (1954) 45 Wn 2d 769, 278 P2d 322.

When trial court, in dismissing case, does not do so as matter of law but weighs evidence and makes findings, supreme court will accept them as verities unless it determines from record that evidence preponderates against them. Youngkin Estate (1956) 48 Wn 2d 432, 294 P2d 426.

On appeal from judgment dismissing action for personal injuries at close of plaintiff's case on ground that there was not substantial evidence to take case to jury, supreme court will accept as true evidence and all reasonable inferences therefrom. Dodge v Stencil (1956) 48 Wn 2d 619, 296 P2d 312.

On appeal from judgment of dismissal entered on sustaining challenge to sufficiency of evidence in jury case, supreme court must construe evidence and all reasonable inferences therefrom most favorably to appellant. Shellenberger v Zeman (1956) 48 Wn 2d 885, 297 P 2d 247.

In reviewing court's refusal to sustain defendant's challenge to sufficiency of evidence, supreme court must consider all evidence and all inferences which may be reasonably drawn therefrom in light most favorable to plaintiff. Caughlan v International Longshoremen's & Warehousemen's Union (1958) 52 Wn 2d 656, 328 P2d 707, 78 ALR2d 313.

On appeal from judgment of dismissal on granting challenge to sufficiency of evidence at close of plaintiff's case, review by supreme court is limited to determining whether there was sufficient evidence or reasonable inference therefrom to establish prima facie case for plaintiff. Schmidt v Pioneer United Dairies (1962) 160 Wash Dec 275, 373 P2d 764.

4.56.160 Judgment by default. Judgment may be had if the defendant fail to answer to the complaint, as follows:

(1) In any action arising on contract for the recovery of money only, the plaintiff may file with the clerk proof of personal service of the summons and complaint on one or more of the defendants. The court shall thereupon enter judgment for the amount claimed, against the defendant or defendants, or against one or more of

the several defendants in the cases provided for in RCW 4.28.190. Where the defendant, by his answer, in any such action, shall not deny the plaintiff's claim, but shall set up a counterclaim amounting to less than the plaintiff's claim, judgment may be had by the plaintiff for the excess of said claim over the said counterclaim.

(2) In other actions the plaintiff may, upon the like proof, apply to the court after the expiration of the time for answering, for the relief demanded in the complaint. If the taking of an account, or of the proof of any fact be necessary to enable the court to give judgment, or to carry the judgment into effect, the court may take the account or hear the proof, or may, in its discretion, order a reference for that purpose. Where the action is for the recovery of damages, in whole or in part, the court may order the damages to be assessed by a jury; or if to determine the amount of damages, the examination of a long account be necessary, by a reference as above provided. If the defendant give notice of appearance in the action, before the expiration of the time for answering, he shall be entitled to five days' notice of the time and place of application to the court for the relief demanded in the complaint.

(3) In action where the service of the summons was by publication, the plaintiff, upon the expiration of the time for answering, may, upon proof of service by publication, apply for judgment; and the court must thereupon require proof of the demand mentioned in the complaint, and must require the plaintiff or his agent to be examined on oath respecting any payments that have been made to the plaintiff, or to any one for his use on account of such demand, and may render judgment for the amount which he is entitled to recover, or for such other relief as he may be entitled to.

LEGISLATIVE HISTORY

Enacted Code 1881 § 289. Based on Laws 1877 p 59 § 293, Laws 1869 p 70 § 291, Laws 1854 p 171 § 225.
See RRS § 411.

CROSS REFERENCES

Default: RPPP 55.04W.
How default judgment made after elapse of year: RPPP 55.08W.
Satisfaction of judgments: RCWA 4.56.100.
Setting aside default: RCWA 4.56.170.
Time for serving answer: RPPP 12.
Trial before referee: RCWA Chapter 4.48.

CIVIL RULE 55. DEFAULT AND JUDGMENT

(a) Entry of Default.

(1) *Motion.* When a party against whom a judgment for affirmative relief is sought has failed to appear, plead, or otherwise defend as provided by these rules and that fact is made to appear by motion and affidavit, a motion for default may be made.

(2) *Pleading After Default.* Any party may respond to any pleading or otherwise defend at any time before a motion for default and supporting affidavit is filed, whether the party previously has appeared or not. If the party has appeared before the motion is filed, he may respond to the pleading or otherwise defend at any time before the hearing on the motion. If the party has not appeared before the motion is filed he may not respond to the pleading nor otherwise defend without leave of court. Any appearances for any purpose in the action shall be for all purposes under this rule 55.

(3) *Notice.* Any party who has appeared in the action for any purpose shall be served with a written notice of motion for default and the supporting affidavit at least 5 days before the hearing on the motion. Any party who has not appeared before the motion for default and supporting affidavit are filed is not entitled to a notice of the motion, except as provided in rule 55(f)(2)(A).

(4) *Venue.* A motion for default shall include a statement of the basis for venue in the action. A default shall not be entered if it clearly appears to the court from the papers on file that the action was brought in an improper county.

(b) Entry of Default Judgment. As limited in rule 54(c), judgment after default may be entered as follows, if proof of service is on file as required by subsection (b)(4):

(1) *When Amount Certain.* When the claim against a party, whose default has been entered under section (a), is for a sum certain or for a sum which can by computation be made certain, the court upon motion and affidavit of the amount due shall enter judgment for that amount and costs against the party in default, if he is not an infant or incompetent person. No judgment by default shall be entered against an infant or incompetent person unless represented by a general guardian or guardian ad litem.

Findings of fact and conclusions of law are not necessary under this subsection even though reasonable attorney fees are requested and allowed.

(2) *When Amount Uncertain.* If, in order to enable the court to enter judgment or to carry it into effect, it is necessary to take an account or to determine the amount of damages or to establish the truth of any averment by evidence or to make an investigation of any other matter, the court may conduct such hearings as are deemed necessary or, when required by statute, shall have such matters resolved by a jury. Findings of fact and conclusions of law are required under this subsection.

(3) *When Service by Publication or Mail.* In an action where the service of the summons was by publication, or by mail under rule 4(d)(4), the plaintiff, upon the expiration of the time for answering, may, upon proof of service, apply for judgment. The court must thereupon require proof of the demand mentioned in the complaint, and must require the plaintiff or his agent to be examined on oath respecting any payments that have been made to the plaintiff, or to any one for his use on account of such demand, and may render judgment for the amount which he is entitled to recover, or for such other relief as he may be entitled to.

(4) *Costs and Proof of Service.* Costs shall not be awarded and default judgment shall not be rendered unless proof of service is on file with the court.

(c) Setting Aside Default.

(1) *Generally.* For good cause shown and upon such terms as the court deems just, the court may set aside an entry of default and, if a judgment by default has been entered, may likewise set it aside in accordance with rule 60(b).

(2) *When Venue Is Improper.* A default judgment entered in a county of improper venue is valid but will on motion be vacated for irregularity pursuant to rule 60(b)(1). A party who procures the entry of the judgment shall, in the vacation proceedings, be required to pay to the party seeking vacation the costs and reasonable attorney fees incurred by the party in seeking vacation if the party procuring the judgment could have determined the county of proper venue with reasonable diligence. This subsection does not apply if either (a) the parties stipulate in writing to venue after commencement of the action, or (b) the defendant has

appeared, has been given written notice of the motion for an order of default, and does not object to venue before the entry of the default order.

(d) Plaintiffs, Counterclaimants, Cross Claimants. The provisions of this rule apply whether the party entitled to the judgment by default is a plaintiff, a third party plaintiff, or a party who has pleaded a cross claim or counterclaim. In all cases a judgment by default is subject to the limitations of rule 54(c).

(e) Judgment Against State. [Reserved.]

(f) How Made After Elapse of Year.

(1) *Notice.* When more than 1 year has elapsed after service of summons with no appearance being made, the court shall not sign an order of default or enter a judgment until a notice of the time and place of the application for the order or judgment is served on the party in default, not less than 10 days prior to the entry. Proof by affidavit of the service of the notice shall be filed before entry of the judgment.

(2) *Service.* Service of notice of the time and place on the application for the order of default or default judgment shall be made as follows:

(A) by service upon the attorney of record;

(B) if there is no attorney of record, then by service upon the defendant by certified mail with return receipt of said service to be attached to the affidavit in support of the application; or

(C) by a personal service upon the defendant in the same manner provided for service of process.

(D) If service of notice cannot be made under subsections (A) and (C), the notice may be given by publication in a newspaper of general circulation in the county in which the action is pending for one publication, and by mailing a copy to the last known address of each defendant. Both the publication and mailing shall be done 10 days prior to the hearing.

[Amended effective July 1, 1977; September 1, 1978; January 1, 1981.]