

question whether, the jury having exercised their proper and peculiar functions in deciding upon contradictory evidence, the court can set aside their verdict, even if the verdict was not satisfactory in the view of the court. On this point, in the case referred to, Lord Hatherly says: "I conclude as I began, by saying that I do not hold it to be the office of the judge to weigh or balance conflicting evidence, however strongly the evidence on one side may, in his judgment, preponderate; that question is for the jury." Lord O'Hagan, in the same case, p. 1182, said, in reference to the question of the "whistling": "Ten witnesses for the defendants swore that the whistling occurred in the proper time and in the usual way; three witnesses for the plaintiff swore that, being in a position if it so occurred the sound should have reached their ears, they did not hear it. It is impossible not to be struck by the apparent weight of the defendants' proof. But, as was observed in the Irish Court of Common Pleas, the jury saw the witnesses, and the judge did not condemn the verdict. And whether it was right or wrong the jurors alone were competent legally and constitutionally to decide between the ten who testified on the one side and the three who testified on the other."

"It was urged, and the authority of the eminent judge was vouched to sustain the suggestion, that proof of the want of hearing was no material proof at all. But this seems to me untenable. Assuming that a man stands in a certain position, and has possession of his faculties, the fact that he does not hear what would ordinarily reach the ears of a person so placed, and with such opportunities, seems to me to be manifestly legal evidence, which may vary in its value and persuasiveness, which may in some instances be of small account, and in others be the strongest and the only evidence possible to be offered; but at all events it cannot be withheld from the jury. And if this be so, there was here a conflict of testimony on which the jurymen, and they alone, were competent to pronounce."

Lord Selbourne, in the same case, said: "But it seems to me impossible to deny that the evidence of persons who, standing in a position where whistling must have been audible, say they heard none, was proper to be left to the jury on the issue whether there was whistling or not, however strong the affir-