

HAS A TRIAL JUDGE OF A UNITED STATES COURT THE RIGHT TO DIRECT A VERDICT

It is the purpose of this article to enquire into the origin of a practice that since about 1850 has obtained in trial courts of the United States, whereby the judge, when he deems it proper, directs the jury as to the verdict they shall render. We would ascertain whether this be a correct practice. Is it not open to the objection, that it conflicts with the requirements of the Seventh Amendment of the Constitution? The question is of immediate importance to a practitioner in the Federal Courts. Moreover, it cannot fail to interest a student of the Constitution, all the more so, since this particular amendment has seldom been brought before the courts for construction.

Let us begin with observing that the practice of directing a verdict is of modern development. It was not known to the common law. Indeed, it had never been heard of at the date when the Seventh Amendment to the Constitution was adopted.

Directing a verdict came into being as the result of experience in the trial of jury cases in State courts. Those courts discarded the demurrer to evidence as not suited to a speedy disposition of cases. In its place they adopted the directing of a verdict, which was considered as practically amounting to the same thing. It seems that courts of the United States have followed this action of the State courts without paying attention to the question whether they were free so to do. Indeed, nobody appears to have raised an objection until recently, that directing a verdict is a proceeding in violation of the Constitution.¹

The language of the seventh amendment is familiar to the reader. It is as follows:

"In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved; and no fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of the common law."

¹ The point was taken before the Supreme Court of the United States in an application for a writ of *certiorari* at the October Term, 1913. The question was not presented, however, in such form as to obtain a ruling and an opinion of the Court thereon. *Allegar v. American Car Foundry Company*, 231 U. S. 747.

The amendment, it will be recalled, was adopted (1789-91) as the result of political considerations of the highest importance. While the circumstances attending its origin are familiar history, we may with profit resort to them in order to view in a true light the amendment itself. Mr. Justice Story, in his treatise upon the Constitution, narrates these circumstances with fullness.

Speaking of the alarm that the people felt on reading the clause that the Supreme Court shall have appellate jurisdiction both as to law and fact, he quotes at length the argument set forth in the *Federalist*, No. 81, and says:

"These views, however reasonable they may seem to considerate minds, did not wholly satisfy the popular opinion; and as the objection has a vast influence upon public opinion, and amendments were proposed by various State conventions on this subject, Congress at its first session, under the guidance of the friends of the Constitution, proposed an amendment [the seventh] which was ratified by the people, and is now incorporated into the Constitution. . . . It weakened the opposition by taking away one of the strongest points of attack upon the Constitution."²

Patrick Henry, in an unsparing attack made in the Virginia convention upon the proposed Constitution, exclaimed:

"This will in its operation destroy the trial by jury. The verdict of an impartial jury will be reversed by judges unacquainted with the circumstances."³

In the North Carolina convention, Spencer denounced, in a like strain, the omission of a jury clause for civil cases. He declared that "our rights and liberties" are "endangered."⁴

One objection, of no little force, was urged, that the judges would sit at a distance from the locality where the jury had acted. Lack of ready communication in those times operated to intensify that undefined dread which a party to a suit experiences at the thought that a bench of judges, in some far off place, may fail to recognize his rights. The tone and tenor of the movement to secure a declaration by amendment of the right to a trial by jury, was manifested in a determined opposition to any interference on the part of the appellate judges with the result reached

² *Story on the Constitution*, Sec. 1768.

³ *2 Elliott's Debates*, 395.

⁴ *3 Elliott's Debates*, 396.

by a jury in their verdict, save as such interference was allowed by the common law rules of practice, in the shape of a bill of exceptions, dealing with such facts only as appeared on the record.

The amendment aimed to continue a system then in vogue by which errors of law were corrected. It declared that the rules of the common law should remain permanent as a protection to the rights of parties to an action at law. That such was its purpose appears, not only from a natural interpretation of the words themselves, but from the language of early commentators on the Constitution, who, it is plain to see, were expressing views which the judges and the bar entertained not many years after the amendment had gone into effect.

Says *Rawle*, in 1829 (quoting the amendment):

"By the first part of it, Congress is disabled from ever taking it away; and by the second, neither a law can be passed by them, nor a practice adopted by the courts, to re-examine facts tried by a jury, otherwise than according to well-known and established principles." (p. 135.)

Says *Bayard*, in 1833:

"The latter part of it is to prevent the infringement of this right by the judges taking upon themselves in any case the power to decide upon matters of fact which have been settled by a jury." (p. 140.)

We are to discover the meaning of the words "a fact tried by a jury," and the "rules of the common law," by reverting to the period when the amendment took effect. What did the framers of the amendment intend? They intended to make certain and unchangeable the terms of a practice. No matter what the future might require, the rules of the common law, precisely as they stood in that day, should govern another court in the mode of re-examining a fact found by a jury. The people were vigilant that no encroachment be attempted by a court upon the province of the jury. The right to a trial by jury in civil causes they clung to as a right peculiarly their own. Here in the plainest terms they provide that this right shall never be impaired, so long as the amendment remains in force.

At that day our population was almost exclusively of Anglo-Saxon stock. Nearly every man felt himself well fitted to sit upon a jury. As freemen, they held the jury system in a ven-

eration no less profound than had their English ancestors. One principle there was to which they tenaciously adhered. It may be expressed in general terms to the effect that the jury alone shall decide questions of fact. A judge, in submitting a case, may express his opinion upon the evidence, but that which was to be found as an ultimate fact, because drawn by proper inference from the testimony, should remain solely for the jury to determine. In order to maintain this right in its integrity the amendment provided that the rules of the common law should govern the re-examination of a fact tried by a jury. The power of the appellate court is confined strictly within these rules.

Re-examination according to the common law rules might be made by the trial judge, upon a motion for a new trial; or, by an appellate court, upon a record brought before them, by a writ allowed for alleged errors of law committed by the judge at the trial. The expression, "the rules of the common law" means the rules of the common law of England, and not the rules of that law as modified by local statute, or usage, in any of the States.⁵

The opinion by Mr. Justice Gray in the case of *Capital Traction Co. v. Hof*, discusses the subject of trial by jury, and defines with precision the scope of the amendment now under examination:

"It must therefore be taken as established, by virtue of the seventh amendment of the Constitution that either party to an action at law (as distinguished from suits in equity or in admiralty), in a court of the United States, where the value in controversy exceeds twenty dollars, has the right to a trial by jury; that when a trial by jury has been had in an action at law, in a court, either of the United States, or of a State, the facts there tried and decided cannot be re-examined in any court of the United States, otherwise than according to the rules of the common law of England; that by the rules of that law, no other mode of re-examination is allowed than upon a new trial, either granted by the court in which the first trial was had, or to which the record was returnable, or ordered by an appellate court for error in law; and therefore, that unless a new trial has been granted in one of these two ways, facts once tried by a jury cannot be tried anew, by a jury or otherwise, in any court of the United States."⁶

⁵ Per Mr. Justice GRAY. *Capital Traction Co. v. Hof*, 147 U. S. 8.

⁶ *Supra*, p. 13.

Not without significance is it that in the seventh amendment the phrase "common law" is twice used. It is as if to declare that the then practice, which had been settled by the established rules of the common law, must not be departed from. A dominating purpose we perceive is the preservation of the right of trial by jury; relying, as a means thereof, upon the maintenance of the rules of the common law, which at that period were governing the procedure whereby errors in trial courts could be corrected, either by the court itself, or by an appellate tribunal. In a word, the right of a trial by jury is to be preserved by a stability of procedure.

The words are plain. There is little need of interpretation. In announcing their true meaning we do well to recall to mind the observations of an eminent jurist who made the Constitution a special subject of study and reflection:

"This court has held in many instances that a constitutional provision intended for the protection of rights of private property should be liberally construed."⁷

The protection which the seventh amendment aims to establish against any action by a court in the direction of reviewing the whole evidence, after a jury has given a verdict, is an end so gravely important that one may well ask with what fidelity have judges obeyed the injunction.

Testimony found admissible at the trial of an action at law could be disposed of in two ways, according to the rules of the common law. The most common method (indeed, it was used almost exclusively) was to submit the testimony to the jury, subject to instructions from the judge as to points of law applicable thereto. Such testimony as the judge had considered inadmissible was withheld from the jury, and an exception allowed to a party, if asked for. In like manner, if a judge admitted testimony against an objection, the party took his exception. The spirit of the rules favored the submission to the jury of all relevant testimony, leaving it to them to treat it as proving or disproving an alleged fact.

An error of law in the judge's ruling was noted on his minutes, upon the taking of an exception. The exception presented a question of law. The Statute of Westminster 2 (13 Edw. 1) gave to a party as his privilege a right to a bill of exceptions,

⁷ Per FIELD, J., dissenting in *Munn v. Illinois*, 94 U. S. 134.

which right could be enforced, should the judge refuse to sign and seal the bill. Only so much evidence could be set out in the bill as was needful to explain the bearings of the judge's ruling upon matters of law in reference to the particular question in dispute.⁸

The rules of the common law did not permit the entire evidence to be sent up to the appellate court in a bill of exceptions, for that would be to substitute that tribunal for the jury in determining questions of fact at issue. Upon extremely rare occasions it may have happened that all the evidence, it being very brief, was sent up, in order that the appellate court might be informed of the meaning of the exception. But the rule was strict that the evidence was always to be treated as incidental to a point of law.

The lawyers who framed the seventh amendment knew perfectly well of the existence of this restriction. A chief purpose in forbidding re-examination was to ensure against possible future legislation by Congress assuming to authorize an appellate court of the United States to examine the entire evidence after a jury had passed upon it.⁹

⁸See *Grand Trunk Railway Company v. Ives*, 144 U. S. 414.

⁹The reader who is curious to learn what regard is paid by courts of the United States to the inhibition of the Seventh Amendment in respect to re-examining a fact found by a jury may turn to *Flannelly v. Delaware & Hudson Co.*, (1912) 225 U. S. 597. He will find that two appellate courts, one after the other, have here re-examined in a manner not in accordance with the rules of common law a fact tried by a jury. Action to recover damages because of the negligence of a railroad company, at a grade crossing, where the vehicle of the plaintiff was destroyed, and the plaintiff herself injured. The railroad set up negligence on the part of the plaintiff. The jury found that the plaintiff was not negligent. The Circuit Court of Appeals examined the evidence—all of which had been sent up on an exception taken to the court's overruling defendant's motion for judgment notwithstanding verdict. No bill of exceptions had been signed. Such a motion as defendant relied on was not known to the common law.

Upon consulting the arguments of counsel (p. 598), it will be seen that the point was raised that such re-examination by the Circuit Court of Appeals was forbidden by the seventh amendment.

The Supreme Court of the United States, it appears, took up the evidence, examined it and came to their own conclusion with regard to the fact whether the plaintiff was negligent. "The view which we take of the evidence examined by the Circuit Court of Appeals." *Per* Van Devanter, J. (p. 604.)

To allow the whole evidence to be certified, upon an exception that the testimony adduced by the plaintiff does not warrant a recovery, was a practice, we say, unknown to the common law. In every such instance, unless the defendant demurred to the evidence, upon which the case was withdrawn from the jury, the plaintiff had a right to go to the jury, no matter how slight was his chance of obtaining a verdict. For an appellate court to re-examine the whole evidence, except as brought before them upon a demurrer to evidence, was a thing unheard of, under the rules of the common law existing at the time of the adoption of the seventh amendment.

Indeed, it may be said, without fear of contradiction, that such an examination was just what the amendment was intended to forbid. It forbade a bench of judges from passing upon evidence that had once been submitted to a jury, and upon which the jury had rendered their verdict.

It is apparent, therefore, that an appellate court of the United States cannot re-examine a fact tried by a jury below, unless the record reaches them in conformity with the rules of the common law of that period. In other words, it is the form of the record that determines whether the appellate court shall have a right to look into the facts tried by a jury.

The Circuit Court of Appeals to-day have the same right, to re-examine a fact tried by a jury, that the appellate courts of England and America were exercising under the common law rules in 1791, but no greater right. The reader may turn to a dictum pronounced by that eminent lawyer, Mr. Justice Matthews, in dealing with this subject.¹⁰ He is speaking of the special and general terms of the Supreme Court of the District of Columbia, which he declares to be terms of one and the same court. The Justice observes:

"In some of the States . . . a writ of error is authorized to bring up for review the proceedings and judgment of an inferior court on which it may be assigned as an error in law on a bill of exceptions setting forth the whole evidence that the court below erred in not granting a new trial because the verdict was against the evidence. Such a practice in the appellate courts of the United States is perhaps forbidden by the seventh amendment to the Constitution of the United States declaring that 'no fact tried by a jury shall be otherwise re-examined in any

¹⁰ *Metropolitan R. R. Co. v. Moore* (1886), 121 U. S. 573.

court of the United States than according to the rules of the common law.'"

Prohibiting a re-examination we see, therefore, was a means adopted by the framers of the amendment in order to preserve the right of a trial by jury. Apt words are employed in order to give lasting effect to this inhibition. Of course, the rules of the common law at that period were definite and fixed. No subsequent change in practice in the State courts could authorize a court of the United States to alter in the slightest degree a procedure which always had been followed as one which accorded with the rules of the common law.

An appellate court of the United States, we repeat, may not in any other way than by a bill of exceptions re-examine the ultimate fact tried by a jury,—the fact which a jury by their verdict have authorized the court to put upon record. Since the rules of the common law knew of no such practice as bringing up the entire evidence on a bill of exceptions, a Circuit Court of Appeals has no right to re-examine the evidence in order to ascertain whether the trial court was right, or not, in sustaining a defendant's request for instructing the jury to find a verdict for the defendant.

Let us now turn for a moment to the subject of demurrer to evidence and ascertain, if we may, what right, if any, a trial court has to direct a verdict.

Says *Blackstone* (III, p. 373):

"A demurrer to the evidence shall be determined by the court out of which the record is sent. This happens where a record of other matter is produced in evidence, concerning the legal consequences of which there arises a doubt in law; in which case the adverse party may, if he pleases, demur to the whole evidence, which admits the truth of every fact that has been alleged, but denies the sufficiency of them all in point of law to maintain or overthrow the issue; which draws the question of law from the cognizance of the jury, to be decided (as it ought) by the Court."

To demur to the evidence was to take a great risk. Still, it was the only way open for a defendant to have the case withdrawn from the jury in a trial court of the United States, since

a peremptory nonsuit, according to the early decisions, would not be ordered against the will of the plaintiff.¹¹

Buller's Nisi Prius, published before 1776, treats of bills of exceptions and demurrers to evidence. In *Conkling's Treatise on Practice in United States Courts* (1842) are to be found the Rules of Practice of the District Court for the Northern District of New York. Rule 50 reads as follows:

"In cases of exceptions taken, demurrer to evidence, or special verdict, the party shall not be required to prepare at the trial his bill of exceptions, demurrer, statement of evidence, or special case, or to put in form the special verdict, but, etc." (Page 542.)

If we turn to *Colby's (Massachusetts) Practice* (1848) we may read at page 242:

"Where the evidence on the part of the plaintiff is all introduced, if the defendant's counsel are of the opinion that, in point of law, the plaintiff cannot recover, he may *demur to the evidence*. But this course has now become nearly obsolete, and can seldom be adopted with safety, since such a demurrer admits not only all the facts directly stated in it, but also all the facts which the evidence legally tends in any degree to prove."¹²

No recent writer, it will be agreed, has thrown light upon the growth of the Trial by Jury with results more informing than has the late James Bradley Thayer, of the Harvard Law School. His chapter on "Law and Fact in Jury Trials," in "A Preliminary Treatise on Evidence at the Common Law" (1898), is worthy of the closest examination. Of demurrers to evidence, Professor Thayer remarks:

"They had the effect to withdraw from the jury all consideration of the facts and in their pure form to submit to the court two questions, of which only the second was, in strictness, a question of law; namely, whether a verdict for the party who gave the evidence could be given (a) as a matter of legitimate inference from the evidence; (b) as a matter of law. Of this expedient I do not observe any mention earlier than the year 1456.

"Near the end of the last century demurrers upon evidence got their death blow in England, by the decision in

¹¹ *Elmore v. Grymes*, (1828) 1 Pet. 469. Compare remarks of Gray, J., in *Central Transportation Co. v. Pullman Car Co.* (1890), 139 U. S. 39.

¹² *Copeland v. N. E. Ins. Co.*, 22 Pick. 135.

the case of *Gibson v. Hunter*, carrying down with it also the great case of *Lickbarrow v. Mason*, which, like the former, had come up to the Lords upon such a demurrer. It was there held that in cases of complication, or uncertainty in the evidence, the party demurring must specify upon the record the facts which he admits."¹³

*Gibson v. Hunter*¹⁴ was decided in 1793. Enough has been said to make it apparent that at the time of the adoption of the seventh amendment, a defendant who deemed the evidence submitted by the plaintiff insufficient, could demur if he chose; otherwise, the evidence went to the jury. As we have already observed, there was no such practice known at that time as directing a verdict.

In confirmation of this statement the following extracts are quoted from writers conversant with the facts:

An editorial note in the May, 1903, number of the *Harvard Law Review*, on "Limitations on Power of Court to Direct Verdict," speaking of State constitutions and the right to trial by jury, says:

"Though the practice of granting new trials may be supported on the ground that it existed at the time the constitutional provisions were adopted, the present practice of directing verdicts having grown up in the last half century cannot be regarded as impliedly recognized by the constitutions."¹⁵

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We read in *Encyclopedia of Pleading and Practice*,¹⁶ "That the practice of directing the verdict was a departure from earlier usage, and was of slow development, is apparent from some of the earlier American authorities."

Mr. Hughes, author of a work upon *Federal Procedure* (1904), says: "In the Virginia practice, which probably is similar to that of many States, such a thing as directing a verdict is unheard of. The only method of taking advantage of the failure of the plaintiff to prove his case is by demurrer to evidence with all its attendant risks." (Page 367.)

In the opinion of Mr. Justice Clifford in *Improvement Company v. Munson*,¹⁷ this language occurs:

¹³ Pages 234-5.

¹⁴ 2 H. Bl. 137.

¹⁵ 16 *Harv. L. R.* 515.

¹⁶ Vol. iv, p. 673.

¹⁷ 14 Wall. 448.

"Formerly it was held that if there was what was called a *scintilla* of evidence in support of a case the judge was bound to leave it to the jury, but recent decisions of high authority have established a more reasonable rule, that in every case, before the evidence is left to the jury, there is a preliminary question for the judge, not whether there is literally no evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the *onus* of proof is imposed."

The words are those of Lord Chelmsford, in *Giblin v. McMullen*, 2 Priv. Counc. App. 317. Of the "recent decisions," that chiefly relied on is *Ryder v. Wombwell*, L. R. 4 Exch. 39, decided in 1868. Not one of the cases cited by Clifford, J., it seems, was decided earlier than 1853.

We are now in a position to inquire how the practice of directing a verdict managed to gain a foothold in trial courts of the United States. Thought of any restriction upon appellate courts of the United States imposed by the seventh amendment could hardly have been present in the judicial mind when approval was given to what at the time seemed to be a desirable change in the method of trying an action at law.

It seems that as late as the October Term, 1877, of the Supreme Court of the United States, in a case where all the evidence had been set out in a bill of exceptions, it was alleged as error that the judge below had directed the jury to find a verdict for the defendants. The Court sustained the ruling, and affirmed the judgment.¹⁸

"We decided in *Improvement Co. v. Munson* (14 Wall. 442) and *Pleasants v. Fant* (22 id. 116), that although there may be some evidence in favor of a party, yet if it is insufficient to sustain a verdict, so that one based thereon would be set aside, the court is not bound to submit the case to the jury, but may direct them what verdict to render. As the question is fully discussed in those cases, it is unnecessary to repeat the discussion here." *Per* Bradley, J.

The former case cited was decided at the December Term, 1871; while Miller, J., delivered the opinion in *Pleasants v. Fant* at the October Term, 1874. It is to be observed that Mr. Justice Bradley declares that the court decided in these cases

¹⁸ *Herbert v. Butler*, 97 U. S. 319, 320.

that the trial judge "is not bound to submit the case to the jury." If the case is not submitted to the jury, the inquiry is pertinent, who is it that determines the issue? Not the jury. The case has not been submitted to them.

Yet we read, upon the heels of this phraseology, that the judge may direct the jury what verdict to render. So the jury *do* determine the issue after all. It is the jury that "brings in" the verdict, though as a matter of fact they may not have left their seats. In order that we may learn upon what grounds the Supreme Court of the United States have based the right of a trial judge of a United States court to direct a verdict, let us look at the reasoning to be found in the two cases cited by Bradley, J.

Pleasants v. Fant, *supra*, presented but a single question. It was whether the defendant was a partner. Both plaintiff and defendant prayed instructions. The Court refused them, and said to the jury:

"There is no evidence in this cause from which the jury can find that the defendant had such an interest . . . as will make him, the defendant, a partner as to third persons, and the jury will, therefore, find their verdict for defendant." (p. 116.)

Plaintiffs in error argued:

"That a circuit court has no authority to order a peremptory nonsuit against the plaintiff's will. But very nearly the same result is reached if after a plaintiff has given what he deems sufficient evidence of his case, and which does confessedly *tend* to prove it, the Court may tell the jury what this Court told the jury below.

The Court (Miller, J.) examines the testimony as to partnership and says:

"We are pressed with the proposition that it was for the jury to decide this question, because the testimony received and offered had some tendency to establish a participation in the profits, and the question of liability under such circumstances should have been submitted to them, with such declarations of what constitutes a partnership as would enable them to decide correctly.

"No doubt there are decisions to be found which go a long way to hold that if there is the slightest tendency in any part of the evidence to support the plaintiff's case it must be submitted to the jury; and in the present case, if the Court had so submitted it, with proper instructions,

it would be difficult to say that it would have been error of which the defendant could have complained here." (Page 120.)¹⁹

Here one notes a recognition of what was formerly known as the doctrine of "scintilla of evidence" which, as we have seen, had at one time a foothold in England. (Consult *Thompson on Trials*, Sect. 2247.) We are apprised of the circumstance that directing a verdict is a modern practice, both in American and in English courts. The opinion continues:

"But as was said by this Court in the case of *The Improvement Co. v. Munson* (14 Wall. 448), recent decisions of a high authority have established a more reasonable rule, that in every case before the evidence is left to the jury, there is a preliminary question for the judge, not whether there is literally no evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the party producing it upon whom the *onus* of proof is imposed.

"The English cases there cited fully sustain the proposition (*Jewell v. Parr*, 13 C. B. 916; *Toomey v. L. & B. Railway Co.*, 3 C. B. (N. S.) 146; *Ryder v. Wombwell*, 4 L. R., 4 Exch. 33), and the decisions of this Court have generally been to the same effect." (p. 120.)

Lord Chelmsford's language about "recent decisions" is repeated, the reader will perceive, as appropriated by Clifford, J.

¹⁹ The utterances of Mr. Justice Miller, wherever made, are listened to with profound respect. It is interesting to note what he says in an article, published thirteen years later, as to the fixed character of the practice required by this amendment.

"The principle that a fact once tried by a jury shall be final and conclusive between the parties, and shall not be otherwise re-examined in any court of the United States than according to the rules of the common law, has been held to mean that a verdict of a jury upon the facts of a case is not only conclusive in that court, but in all other courts where the same question of fact may come in controversy between the same parties; and that a re-examination, according to the course of the common law referred to in that article, is on a motion for a new trial in the same court, where the verdict may be set aside, or by a writ of error to some court which has appellate jurisdiction over the court in which the trial took place. It is therefore to be seen that the trial by jury in the Federal courts, in almost all of its original English features, and perhaps beyond those, has been fixed upon the judicial system of the United States with the utmost rigidity. Nothing short of constitutional amendments can affect in any very important matter this system."

The System of Trial by Jury, by Samuel F. Miller (1887), 21 *Am. Law Review*, 860.

We discover it to be the English practice, which the Supreme Court is here approving.

Mr. Justice Miller then proceeds to cite three cases decided by the Supreme Court, which, according to his reasoning, sustain the "proposition" that it is "a more reasonable rule" for the judge to decide the preliminary question, whether the jury "can properly proceed to find a verdict, etc." He cites *Parks v. Ross*, (1850), 11 How. 362, where the defendant asked at the close of the plaintiff's testimony, that the court instruct the jury "if the evidence is believed by the jury to be true, the plaintiff is not entitled to recover." Grier, J., delivered the opinion in that case, sustaining the ruling of the trial judge. It seems that the Supreme Court examined "the admitted facts," and found that there was "no evidence whatever tending to show that Ross had contracted personally to pay." (p. 374.)

"In the case of *Parks v. Ross*," says Mr. Justice Miller, "this court held that the practice of granting an instruction like the present had superseded the ancient practice of demurrer to evidence, and that it answered the same purpose and should be tested by the same rules; and in that case it said the question for the consideration of the court was whether the evidence submitted was sufficient to authorize the jury in finding the contract set up by plaintiff. And in *Schuchardt v. Allen* (1 Wall. 359) this case is referred to as establishing the doctrine that if the evidence be not sufficient to warrant a recovery, it is the duty of the Court to instruct the jury accordingly." (p. 121.)

The case of *Pawling v. United States* (4 Cranch, 219) is cited as indicating a correct view of the doctrine of a demurrer to evidence.

Of directing a verdict, Grier, J., says that it "has in many States superseded the ancient practice of a demurrer to evidence." The federal court is plainly seen here to be following the State practice, as being a new and more convenient mode of procedure.

We discover, therefore, that it is the decision in *Parks v. Ross* which furnishes the ground for sustaining the practice of directing a verdict. But counsel in *Parks v. Ross* did not raise the point that the seventh amendment prohibits such a practice as directing a verdict. Nor has it elsewhere been raised, that we can discover. No court has ventured to express its views as to the application of the inhibitions of the amendment, for the very

good reason, we presume, that no court has ever been asked so to do. The question therefore, it would seem, remains open for determination.

In *Pleasants v. Fant*, the Court say:

"We hold the true principle to be, that if the Court is satisfied that, conceding all the inferences which the jury could justifiably draw from the testimony, the evidence is insufficient to warrant a verdict for the plaintiff, the Court should say so to the jury." (p. 122.)

A review of these decisions shows that the Court apparently did not take into consideration what effect, if any, the language of the amendment under review could have had upon the question of the legality of this new departure from a long settled practice. It seems to have been assumed that the customary application of the rules of the common law had been in no wise disturbed. At all events, nothing is said in the opinion about common law rules.

One readily admits that the growth of the country, the changes wrought in methods of business, particularly the advent of corporations with the constantly increasing crop of suits for damages brought against them, have made it desirable that actions wherein the evidence is scanty be disposed of by a method more speedy than that which is afforded by the old-fashioned demurrer to evidence. Several States (and a State is not hampered in this respect by constitutional restrictions) have adopted the practice of directing a verdict. So far as tested in the federal courts, it would seem that the new method in the main has worked out substantial justice. The question here, however, is not,—Does the new departure work well? What is asked is,—Can it be maintained in the face of the prohibitive terms of the seventh amendment?

The view expressed by Lord Chelmsford, and approved, as we have seen, by the unanimous opinion of the Supreme Court of the United States—

" . . . that in every case before the evidence is left to the jury, there is a preliminary question for the judge, not whether there is literally no evidence, but whether there is any upon which a jury can properly proceed to find a verdict,"

in itself embodies nothing new; but it demands a critical examination, since it has been accepted as the foundation for a depar-

ture in the Federal courts from the practice established under the rules of the common law. Before we enquire, however, into the circumstances of its application, a single word may properly be said as to a possible objection that directing a verdict is depriving a party of his right to trial by jury.

Certain decisions of State courts hold that to direct a verdict is not to deprive the losing party of his right to a trial by jury. The reasoning substantially is that trial by jury is designed to determine only questions of fact which are disputed. Where the evidence is "all one way," there is nothing, it is said, for the jury to decide.

For example, a jury are told to find for the defendant. They do so. They do not weigh the evidence, or draw inferences from it. The judge has spared them the trouble. They simply register a conclusion, which the judge has reached. Thus time is saved. Surely this looks harmless enough.

And yet it is a line of reasoning which provokes one to cast about to determine whether in truth it be sound. But, for the present at least, it is enough to say that decisions of State courts in this field are of no great importance to our present enquiry, for the reason that State courts (with the single exception, we believe, of West Virginia) are not brought under the prohibitive terms of the seventh amendment in regard to a re-examination, etc.²⁰

The doctrine of "preliminary question,"—that is, whether there be any evidence upon which a jury can properly find a verdict for the plaintiff,—and submitting this question to the jury under instructions to find for defendant, is as we have seen of an origin comparatively recent. It was not known to the common law. Such a question at the time the seventh amendment went into effect formed the subject of a demurrer to evidence.

This preliminary question has been termed a "question of law." The expression "question of law" must be taken at its proper meaning. A question for the court may well enough be called "a question of law," in order to distinguish it from a question of fact that goes to the jury. But an analysis of the enquiry whether there be any evidence to warrant the finding of a verdict, will discover that such an enquiry is really a question of fact, precisely as is the regularly recurring question which the

²⁰ See remarks of Snyder, J., 1885, in *Barlow v. Daniels*, 25 W. Va. 514.

jury take with them to the jury-room, namely, Does the evidence, together with the inferences to be drawn therefrom, satisfy us that the plaintiff has proved his case?

The question raised on demurrer to the evidence,—Is there any evidence to warrant a verdict?—is nothing more nor less than a question of fact. To answer it requires no special knowledge of legal principles. It naturally enough came to be entrusted to the trial judge, because of his experience. That it was to be decided by him, and not by the jury, invested it with the character of a question of law. "They called it" a question of law. In other words, it became a question for the court. And yet, the trial judge, in answering it, went through identically the same process that a jurymen does in settling such questions of fact as are presented to him in the process of reaching the ultimate fact, *i.e.*, the verdict.

Proof that this preliminary question is one of fact is afforded from the circumstance that, under the practice which we are reviewing, it is consigned to the jury to answer. True, they answer it under an instruction how they shall find their verdict. Nevertheless the jury do, in contemplation of law, ask themselves the question, for example,—Is there any evidence upon which a verdict for the plaintiff can be found? When a jury is directed to render a verdict for the defendant, they first find as a fact that, upon the whole evidence, the plaintiff cannot recover. They find precisely the same fact that the trial judge used to find in disposing of a demurrer to evidence. This result they reach by taking the identical steps that he did. So far as the mental process of reaching a conclusion is concerned, the two methods are one and the same thing.

Continuing in this line of thought, let us see what a jury actually do in rendering a verdict under direction. We sometimes encounter an argument, advanced by one who elsewhere proves himself an acute reasoner, that a jury who render a verdict because directed so to do are really deciding no fact, since there is no fact in issue to decide. The evidence is undisputed; and no issue of fact therefore has been left open for the jury to pass upon.

The reasoning is fallacious. He who propounds it leaves out of the reckoning altogether the factor that a verdict settles upon the record the chief question in issue, namely, whether the defendant owes the plaintiff, or (if the action be in tort) whether the defendant has damaged the plaintiff. In fact, it is

impossible to conceive of a jury, in an action of contract, finding for the defendant without thereby asserting that they "find the truth to be," that the defendant does *not* owe the plaintiff as alleged.

Or, to speak in different terms of their discharge of duty, the common law looked upon the jury as free to act of their own motion in respect to drawing inferences from the evidence, subject only to instructions from the court as to the law applicable to this or that state of facts, if it shall be found by them to be true. The rules of the common law either withheld the evidence from the jury under the form of a demurrer, or entrusted it to them untrammelled by direction as to which party they should find for, save as the law applicable to this or that fact, which they might find to be true, would serve as their guide.

When one asserts that the common law knew no such practice as that of directing a verdict, the meaning is obvious. It is only another way of asserting that the office of a jury is not to register a verdict, prepared for them by the presiding judge, but to take the evidence into consideration, retire, and upon comparison of views reach a conclusion of fact (if they can agree), which they put into the shape of a verdict.

Courts in some instances, when passing upon a question of the functions of the jury, appear to have overlooked the duty and the right of a jury to find from the evidence the ultimate fact, which takes the form of a verdict. The theory is not a sound one that the sole occasion for a jury to act is when a disputed question of fact as to the meaning of the evidence is presented. The evidence may be undisputed, but the question of fact remains, Is the plaintiff's claim proved?

Upon this topic, Professor Thayer discourses with his customary acuteness.

"We are not then to suppose," he says, "that a jury has found all the facts merely because it has found all that is needed as a basis for the operation of the reasoning faculty; the right inference or conclusion in point of fact, is itself matter of fact, and to be ascertained by the jury. As regards reasoning, the judges have no exclusive office; the jury must also perform it at almost every step."²¹

It is not the common law conception of a jury that they perform their duty at times by simply registering an order of the

²¹ *Preliminary Treatise on Evidence*, p. 194.

judge, who, upon a view of the evidence, tells them what they are to do,—what verdict they are to render.

Professor Thayer cites the following as a note to what has just been quoted:

“It is not because facts are admitted that it is therefore for the judge to say what the decision upon them should be. If the facts which are admitted are capable of two equally possible views, which reasonable people may take, and one of them is more consistent with the case for one party than for the other, it is the duty of the judge to let the jury decide between such conflicting views.” Bowen, L. J., in *Davey v. London & S. W. Railway Co.*, 12 Q. B. D. 70, 76. In citing this passage with approval, Williams, J., in *Pearce v. Landowne*, 69 L. T. Rep. 316, said: ‘I do not believe that because the facts are admitted the functions of the jury as to drawing inferences from them are altered at all.’”

The question then demands an answer—Does directing a verdict in a trial court of the United States deprive a party of his right to a trial by jury within the meaning of the Seventh Amendment of the Constitution? We have found it impossible to escape the conviction that logically such a practice does work out this deprivation. The same answer must be given to-day that would have been given had the question been asked soon after the amendment went into effect in 1791.²²

In the earlier day, when a defendant thought that the testimony presented by the plaintiff was not sufficient to entitle the plaintiff to a verdict, he could demur to the evidence. He was obliged either to do that, or to take his chances with the jury.

In the old common law practice, when there was demurrer to evidence, the judge ordered the associate to take a note of the

²² We would not have the reader imagine that we are in the least degree lacking in sympathy with the movement already begun for expediting, in the federal courts, the trial of causes. We find ourselves in full accord with every proposal that looks to a simpler and a more speedy procedure. We have brought forward the question of constitutionality for the purpose of ascertaining whether or not it be an obstacle to certain reforms in practice, taken by the court itself. If the power to direct a verdict actually exists, the point of unconstitutionality must be pronounced to be without merit. If, however, it shall be discovered that the injunction of the Constitution does stand in the way of legally providing thus for a speedier disposition of business, then a first step towards a remedy will have been taken.

testimony, and that was signed by the counsel on both sides and the demurrer affixed to the postea. (*Buller's Nisi Prius*, p. 307.) Upon a rejoinder, the jury were discharged. Sometimes they found the amount of damages subject to the decision on the demurrer.

It will be seen that the question presented is that of fact; but because of its being withdrawn from the jury, and laid before the court, it is regarded as "a question of law." It is the form and manner of its decision that gives to it this name.

A cardinal rule in preparing a demurrer is that it is the fact which is to be put on record, not the testimony to prove the fact. The party demurring admits the facts, and all inferences properly to be drawn from them. The great risk run by the party who demurs is that "he confesses all the facts which the evidence, directly or indirectly, tends to prove." *Elliott's General Practice*, sec. 872.²³

"A demurrer to evidence should state facts, and not the evidence which tends to prove those facts; and when the evidence is oral, and merely tends to prove or disprove some important fact, or facts, in issue, the demurrer should not set out the evidence, but the fact or facts which it tends to establish." (*Per* Mulkey, J., 92 Ill. 237 (1879), *Crowe v. The People*.)

As we have already seen, Mr. Justice Grier says of the practice of directing a verdict, "It has superseded the ancient

²³ By the rules of the common law such a determination of fact expressed upon the record as having been reached upon the whole evidence, was required to be brought into the appellate court upon writ of error, in no other way than by exception to a judgment sustaining a demurrer to evidence. In such a demurrer defendant must have admitted the facts presented by the plaintiff, and not merely the evidence from which the existence of the facts is inferable. It was only because the facts had thus been admitted, and entered upon the record, that the jury were not called upon to find them from the evidence, as well as to find the ultimate fact in the shape of their verdict.

As has already been remarked, the rules of the common law knew of no such practice as that of bringing all the testimony in a law case, verbatim, in the form of questions and answers up to an appellate court. Had it been proposed, in the early days, to take this step, it would not for a moment have been tolerated, because it virtually allows a bench of judges to try the case all over again on the facts.

". . . It is certainly not an attribute of that writ, according to common law doctrine, to submit the testimony as well as the law of the case to the revision of this Court."

Per Mr. Justice Johnson, *Parsons v. Armor* (1830), 3 Pet. 425.

practice of a demurrer to evidence. It answers the same purpose, and should be tested by the same rules." In explanation of what is meant, the opinion continues:

"A demurrer to evidence admits not only the facts stated therein, but also every conclusion which a jury might fairly or reasonably infer therefrom."

If by the expression "tested by the same rules" the learned Justice would have it understood that a trial judge bestows the same quantum of time and attention upon the meaning of the facts, in directing a verdict that he does in deciding a demurrer to evidence, the statement is obviously incorrect. The two methods in their practical operation differ in important particulars.

Says an approved writer on Practice:

"There is a difference between demurring to the evidence and moving the Court to direct a verdict, for until the direction is given the case is not withdrawn from the jury, whereas in the case of a demurrer to the evidence, and a joinder, there is a complete withdrawal by the acts of the parties themselves. It may be true that the Court may, for cause shown, permit the case to go to the jury after the joinder in demurrer, but upon principle the parties cannot as a matter of right demand that it shall be submitted to the jury."

Elliott's General Practice (1894), sec. 865.

We need not enlarge upon the topic of the difference between these two modes of disposing of a plaintiff's evidence. Demurring to evidence was the subject of examination by the Supreme Court of the United States, in a recent case. That directing a verdict is by no means identical with demurring to evidence is plainly pointed out by the Justice delivering the opinion.²⁴

²⁴ "In what has been said we would not be understood as implying that a motion for a compulsory nonsuit and a demurrer to the evidence are equivalents of a request for a directed verdict, for while they are sometimes spoken of as analogous to it, this only means that for the purpose of each the evidence must be taken most strongly in favor of the opposite party. In other respects they are essentially unlike. A motion for a compulsory nonsuit looks to an arrest of the trial and a dismissal of the cause, leaving the merits undetermined and the plaintiff free to sue again, while a request for a directed verdict looks to a completion of the trial and adjudication of the merits through the accustomed coöperation

A plaintiff enjoys an advantage under the common law rules governing a demurrer to evidence. The advantage is an incident of the general rule which sends to the jury every question of fact, and which views with scant favor the entrusting of a decision of fact to the trial judge.

Experience may have satisfied us that our fathers were unduly concerned as to the danger of permitting a question of fact to be determined by the judge presiding at a trial. Although this be true; nevertheless the rule which they ordained stands, until the Constitution shall be further amended.

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of the court and jury. Full recognition of this, as also of its bearing here, is found in *Oscanyan v. Arms Co.*, 103 U. S. 261, 264, where it is said: "The difference in the two modes is rather a matter of form than of substance, except in the case of a nonsuit a new action may be brought, whereas in the case of a verdict the action is ended, unless a new trial be granted either upon motion or upon appeal."

"Equally pronounced is the difference between a demurrer to the evidence and a request for a directed verdict; for if on such a demurrer, properly joined in and allowed, judgment is not given for the demurrant, it is necessarily given for his opponent, while if a request for a directed verdict is denied the party making the request may yet receive the jury's verdict and a judgment thereon. And when a judgment on a demurrer to the evidence is reversed because given for the wrong party, the error is corrected by ordering a judgment for the other party, whereas when a judgment is reversed for error in granting or refusing a request to direct a verdict, judgment is not ordered for either party, but a new trial is awarded."

Slocum v. New York Life Ins. Co., 228 U. S. 394, Per Van Devanter, J., speaking for the majority of the Court.