NOTE

Trial by Jury Under the Seventh Amendment

During this war for freedom it is both natural and fitting that questions respecting civil liberties should engage the attention of the Supreme Court of the United States, particularly questions respecting freedom of speech and worship. Yet the notoriety attending decisions on these freedoms is likely to obscure the consideration that the court has of late been giving to another guarantee of the Bill of Rights—the right of trial by jury.

It is noteworthy that, though the Seventh Amendment secured the right to trial by jury in 1791, the most significant interpretations of the Amendment are contemporary, or nearly so. Of course, constitutional questions would not be expected to arise as long as the procedures of 1791 were retained, and since procedural change has been slow many questions concerning the Amendment are understandably of recent origin. It is remarkable, however, that some of the procedures questioned nowadays for the first time are of long established standing.

The cases referred to in the preceding statements are *Slocum v. New York Life Insurance Co.*,[1] decided in 1913; *Baltimore & Carolina Line, Inc., v. Redman*[2] and *Dimick v. Schiedt*,[3] both decided in 1935; and *Galloway v. United States*,[4] decided in 1943. They differ widely in many respects, but all deal with the common problem of the scope of trial by jury in the federal courts. Together they represent the current trend of decisions on that basic matter.

The *Slocum* case was an action brought on a life insurance policy in the Circuit Court for the Western District of Pennsylvania. At the conclusion of the evidence defendant requested the court to direct a verdict in its favor, which the court declined to do. After the jury returned a verdict for plaintiff, defendant moved for judgment in its favor on the evidence notwithstanding the verdict. The motion was denied and judgment was entered for the plaintiff. The case was taken on writ of error to the Circuit Court of Appeals, where error was assigned on the refusal to direct a verdict and on the denial of the motion for judgment n. o. v. That court reversed the judgment, with a direction to sustain the latter motion on the ground that the evidence did not legally admit of the conclusion that the policy was a subsisting contract at the time of the insured's death. A writ of *certiorari* brought the case to the Supreme Court. There it was held that although the evidence did not admit of the conclusion that the policy was in force when the insured died, and although the Circuit Court should have directed a verdict for defendant, nevertheless the Circuit Court of Appeals was in error in ordering a judgment for defendant n. o. v. The judgment of the Circuit Court of Appeals was accordingly modified by eliminating the direction to enter judgment and by substituting a direction for a new trial.

Mr. Justice Van Devanter, speaking for a majority of the court, called attention to the provision of the Seventh Amendment that "no fact tried by a jury shall be otherwise reëxamined in any Court of the United States,

1. 228 U. S. 364 (1913).
2. 295 U. S. 654 (1935).
3. 293 U. S. 474 (1935).
4. 63 Sup. Ct. 1077 (1943).

than according to the rules of the common law",[5] and, as regards those rules he quoted as follows from a decision by Mr. Justice Story in 1830: "The only modes known to the common law to re-examine such facts, are the granting of a new trial by the court where the issue was tried, to which the record was properly returnable, or the award of a *venire facias de novo,* by an appellate court, for some error of law which intervened in the proceedings." [6] Hence he held that the verdict in plaintiff's favor, although erroneously allowed, "operated, under the Constitution, to prevent a re-examination of the issues save on a new trial." [7]

Furthermore, he offered an explanation of the common law practices of motion in arrest of judgment, motion for judgment n. o. v. and demurrer to the evidence to show that in these practices there was nothing inconsistent with Mr. Justice Story's statement. He pointed out that the first two motions did not involve a re-examination of facts determined by the jury, because they were granted solely on the basis of defects in the pleadings. As to the demurrer to the evidence, he said: "there was nothing in the nature or operation of the demurrer to evidence at common law which has any tendency to show that issues of fact tried by a jury could be reëxamined otherwise than on a new trial." [8]

Mr. Justice Hughes spoke for the four Justices who dissented. After cautioning that the Seventh Amendment "deals with matters of substance and not with mere matters of form", he asserted that the decision of the majority resulted from "a failure to regard the full scope and import of common law procedure".[9] He cited *Chinoweth v. Lessee of Haskell,*[10] a former decision of the Supreme Court, to show "that the practice in the present case did not differ in its essential features from that permitted at common law".[11] In that case defendant demurred to plaintiff's evidence. The trial court reserved decision on the demurrer and the jury found a verdict for plaintiff subject to the court's opinion on the demurrer. The court then overruled the demurrer and entered judgment for plaintiff on the verdict. The Supreme Court, reviewing the evidence, found that the demurrer ought to have been sustained, and therefore reversed the judgment for plaintiff and remanded to the district court with directions to enter judgment in favor of defendant. "Here then", said Mr. Justice Hughes, "is a case, in this court, which contradicts the conclusion that there is no permissible practice under the Constitution by which, when a verdict has been taken for the plaintiff and it has been found . . . that there is no legal basis for it in the evidence, judgment can be directed for the defendant".[12] He concluded that "all that has been done in the present case could, in substance, have been done at common law, albeit by a more cumbrous method." [13]

Mr. Justice Hughes did not expressly point out that the trial judge in the *Slocum* case had not reserved his decision on the motion for directed verdict, and that in this respect what was done differed from the common law practice referred to. This difference he evidently waived aside as a trifle of no significance. He was convinced that a plaintiff whose verdict

5. At 376.
6. At 378.
7. At 398.
8. At 392.
9. At 408.
10. 3 Pet. 92 (1830).
11. At 416.
12. At 416-417.
13. At 428.

is not sustainable by the evidence was not entitled to a new trial at common law and should be entitled to none today. No mere differences of procedural detail could alter that basic conviction.

The views of Mr. Justice Hughes were partially vindicated by the case of *Baltimore & Carolina Line, Inc. v. Redman*,[14] which was decided by a unanimous court in 1935. This was an action for alleged negligent injury in a federal court in New York. At the conclusion of the evidence the defendant moved for a dismissal of the plaintiff's complaint on the ground that the evidence was insufficient to support a verdict for the plaintiff. The court, reserving decision on the motion, submitted the case to the jury subject to its opinion on the question reserved. The jury returned a verdict for the plaintiff, and the court then overruled the defendant's motion for dismissal and entered judgment for the plaintiff on the verdict. The Circuit Court of Appeals held the evidence insufficient to sustain the verdict, reversed the judgment and ordered a new trial, declining the defendant's request that the direction be for a dismissal of the complaint. The Supreme Court granted the defendant's petition for *certiorari*, and modified the judgment of the Circuit Court of Appeals by substituting a direction for a judgment of dismissal on the merits in place of the direction for a new trial. Mr. Justice Van Devanter, who wrote the majority opinion in the *Slocum* case, spoke for the court. "In [the *Slocum*] case", he said, "the defendant's request for a directed verdict was denied without any reservation of the question of the sufficiency of the evidence", whereas in the present case "the trial court expressly reserved its ruling".[15] "At common law", he continued, "there was a well established practice of reserving questions of law arising during trials by jury and of taking verdicts subject to the ultimate ruling on the questions reserved",[16] which "undoubtedly was well established when the Seventh Amendment was adopted and therefore must be regarded as part of the common law rules to which resort must be had in testing and measuring the right of trial by jury as preserved and protected by that Amendment".[17] Then he referred as follows to the *Chinoweth* case [18] on which Mr. Justice Hughes had placed capital reliance in dissenting in the *Slocum* case, and which he himself had overlooked in the majority opinion in that case: "This Court has distinctly recognized that a federal court may take a verdict subject to the opinion of the court on a question of law, and in one case where a verdict for the plaintiff was thus taken has reversed the judgment given on the verdict and directed a judgment for the defendant." [19] Finally, he remarked of the *Slocum* case: "It is true that some parts of the opinion in that case give color to the interpretation put on it by the court of appeals. In this they go beyond the case then under consideration and are not controlling. Not only so, but they must be regarded as qualified by what is said in this opinion." [20]

Thus while some of the generalizations in the *Slocum* opinion are repudiated the ruling in that case is adhered to. This means that, under the *Slocum* case, the plaintiff who receives a verdict *after* defendant's motion for directed verdict is wrongfully denied still has the right to a new trial; but, under the *Redman* case, if he receives the verdict *before* defendant's motion is ruled upon—the court having reserved decision thereon—the

14. *Supra* note 2.
15. At 658.
16. At 659.
17. At 660.
18. *Supra* note 10.
19. At 660-661.
20. At 661.

right is denied and defendant is entitled to judgment.[21] The ancient practice of reserving ruling is thus made the basis for a distinction which creates in the one case a constitutional right to another trial that is denied in the other. However, the right created is obviously insubstantial if its existence depends upon the adventitious circumstance that the ruling on defendant's motion for a directed verdict is deferred. When the court seizes upon this fortuity as the basis for refusing the "right" it makes the initial recognition of the "right" indefensible. Acknowledgment of the errors in the opinion in the *Slocum* case called for the overruling of that case.[22]

Although the *Slocum* case was not overruled, its significance was restricted. A few years later when the Supreme Court promulgated the Federal Rules of Civil Procedure the case was completely nullified. Rule 50 (b) provided that "Whenever a motion for a directed verdict made at the close of all the evidence is denied . . . the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion." Thus after more than a score of years the fundamental error of the *Slocum* case in misinterpreting common law practice was corrected by resort to the venerable common law device of a fiction.[23]

The case of *Dimick v. Schiedt* [24] was decided a few months earlier than the *Baltimore & Carolina Line* case and also dealt with the plaintiff's right to a new trial. This was an action for damages for personal injuries, instituted in the federal district court in Massachusetts. The jury returned a verdict for the plaintiff for $500. The plaintiff moved for a new trial on the ground inter alia that the damages were inadequate. The trial court ordered a new trial on this ground, unless the defendant would file a stipulation consenting to increase the damages to $1,500. Plaintiff's consent was neither required nor given, but defendant did consent. A denial of the motion for a new trial followed automatically, and judgment was entered for plaintiff for $1,500. On plaintiff's appeal to the Circuit Court of Appeals a divided court reversed the judgment and remanded the case for further proceedings on the ground that plaintiff's rights under the Seventh Amendment had been violated. The Supreme Court granted *certiorari* and by a vote of 5 to 4 affirmed the ruling of the Circuit Court of Appeals.

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21. *Cf.* Aetna Ins. Co. v. Kennedy, 301 U. S. 389 (1937).

22. For criticisms of the *Slocum* case see the following: THORNDIKE, *Trial by Jury in United States Courts* (1913) 26 HARV. L. REV. 732; THAYER, *Judicial Administration* (1915) 63 U. OF PA. L. REV. 585; (1913) 38 A. B. A. REP. 561; SCOTT, *Trial by Jury and the Reform of Civil Procedure* (1918) 31 HARV. L. REV. 669, 688. *Cf.* SCHOFIELD, *New Trials and the Seventh Amendment—Slocum v. New York Life Insurance Co.* (1913) 8 ILL. L. REV. 287, 381, 465.

23. *Cf.* the suggestion of Thorndike: "The decision of the majority of the court is a public misfortune, because it destroys a simple means of enforcing, without the expense, delay, and uncertainty of a new trial, a right to which the decision shows that a party was entitled at the trial. There is, however, a way in which the consequences of the decision may be mitigated. The Pennsylvania statute provides only for recording the evidence, when the Judge is asked to direct a verdict. If some words were added authorizing also the recording of such alternative or other findings as the judge may think proper to take, then the court on a subsequent motion or on appeal could enter the proper judgment on the alternative finding. For example, in the case just decided, the judge might have directed the jury, if they gave a verdict for the plaintiff, to give also an alternative verdict for the defendant if the court should be of opinion that the evidence did not justify a verdict for the plaintiff. The alternative verdict would be as good as if it had been the only verdict, and nobody could say that the Constitution was infringed by entering judgment upon it. This may seem a mere form, but, if the decision is right, it is a matter of substance." THORNDIKE, *op. cit. supra* note 22 at 737.

24. *Supra* note 3.

Mr. Justice Sutherland, speaking for the majority, asserted that "the established practice and the rule of the common law, as it existed in England at the time of the adoption of the Constitution, forbade the court to *increase* the amount of damages awarded by a jury in actions such as that here under consideration".[25] He then dealt with the contention "that our federal courts from a very early day have upheld the authority of a trial court to deny a motion for new trial because damages were found to be excessive, if plaintiff would consent to remit the excessive amount, and that this holding requires us to recognize a similar rule in respect of increasing damages found to be grossly inadequate".[26] He contended that this practice of remittitur "has been condemned as opposed to the principles of the common law by every *reasoned* English decision, both before and after the adoption of the Federal Constitution" and added that "it, therefore, may be that if the question of remittitur were now before us for the first time, it would be decided otherwise". "But", he concluded, "the doctrine has been accepted as the law for more than a hundred years and uniformly applied in the federal courts during that time. And, as it finds some support in the practice of the English courts prior to the adoption of the Constitution, we may assume that in a case involving a remittitur, which this case does not, the doctrine would not be reconsidered or disturbed at this late day".[27] Furthermore, he emphasized the following difference between the practice of remittitur and additur:[28] "Where the verdict is excessive, the practice of substituting a remission of the excess for a new trial is not without plausible support in the view that what remains is included in the verdict along with the unlawful excess—in that sense that it has been found by the jury—and that the remittitur has the effect of merely lopping off an excrescence. But where the verdict is too small, an increase by the court is a bald addition of something which in no sense can be said to be included in the verdict".[29]

In dissenting, Mr. Justice Stone took issue with the majority's contention that the common law rule in 1791 forbade additur. He observed that "in no recorded case does it appear that any English judge had considered the possibility of denying a new trial where the defendant had consented to increase the amount of recovery."[30] This negative evidence, he thought, points not to the existence of a positive rule forbidding additur, but rather to the conclusion that there was no common law rule on the subject at all. Next, he drew a forceful comparison between the Seventh Amendment and the Judiciary Act of 1789. That Act, he pointed out, adopted the common law rules of evidence for criminal trials in federal courts, but, because one of the principles thus adopted was "the adaptability of the common law to every new situation to which it might be needful to apply it", the court had held that the rules to be applied "are not the particular rules which were in force in 1791, but are those rules adopted to present day conditions".[31] Then he continued as follows: "The common law is not one system when it, or some part of it, is adopted by the Judiciary Act, and another if it is taken over by the Seventh Amendment. If this Court could thus, in conformity to common law, substitute a new rule for an old one

25. At 482.

26. *Ibid.*

27. At 484-485.

28. This term seems to have been coined by Morton, J. dissenting in the Circuit Court of Appeals. Schiedt v. Dimick, 70 F. (2d) 558, 563 (C. C. A. 1st, 1934).

29. At. 486.

30. At 495.

31. At 496.

because it was more consonant with modern conditions, it would seem that no violence would be done to the common law by extending the principle of the remittitur to the case where the verdict is inadequate, although the common law had made no rule on the subject in 1791." [32]

Of course, he recognized that the Seventh Amendment imposes limits on such extensions of the common law. Previously he had pointed out that while the Amendment was not "intended to perpetuate in changeless form the *minutiae* of trial practice as it existed in the English courts in 1791" its purpose was "to preserve the essentials of the jury trial as it was known to the common law before the adoption of the Constitution".[33] Accordingly, he argued that recognition of additur would not alter the essentials of common law trial by jury. In this connection he noticed that at common law the motion for new trial was not made before the trial judge but before the court *en banc,* and there was no appellate review of the ruling granting or denying the motion. Hence he said of the instant case: "A denial of the motion out of hand, however inadequate the verdict, was not an encroachment upon the province of the jury as the common law defined it. It would seem not to be any the more so here because the exercise of the judge's discretion was affected by his knowledge of the fact that a proper recovery had been assured to the plaintiff by the consent of the defendant. Thus the plaintiff has suffered no infringement of a right by the denial of his motion. The defendant has suffered none because he has consented to the increased recovery, of which he does not complain." [34]

Fundamental similarities between the *Dimick* and *Slocum* cases are not far to seek. In each the plaintiff is basing the claim to a new trial on the contention that the common law gave him the right and that the Seventh Amendment makes the common law rule immutable. Each case therefore requires a painstaking examination of the details, often obscure, of what Mr. Justice Stone calls "the legal scrap heap of a century and a half ago".[35] In each case to grant the plaintiff's contention will prevent the operation of procedural reforms designed to mitigate the burden of new trials on the courts. The plaintiff wins, not, however, without the vigorous protest of four dissenting justices that the majority misconstrue the common law to create rights unknown to that system and then impose the system thus erroneously altered as a barrier to much needed procedural reforms. The outstanding difference between the two cases is, of course, that a way was found around the restrictions of the *Slocum* case, whereas no escape from the *Dimick* case, short of overruling it, is yet apparent.

In the *Slocum* and *Baltimore & Carolina Line* cases no question was raised as to the propriety under the Seventh Amendment of defendant's motion for directed verdict. Indeed, one would scarcely expect such a question to be raised, for since 1850 the Supreme Court has been passing upon rulings on motion for directed verdict without suggesting any doubt as to the validity of the practice.[36] Nevertheless in *Galloway v. United States,*[37] decided in 1943, that very question was raised and decided. Plaintiff, against whom the verdict had been directed below, predicated his argument on features of the common law demurrer to the evidence and motion

32. *Ibid.*
33. At 490.
34. At 492-493.
35. At 495.
36. See HACKETT, *Has a Trial Judge of a United States Court the Right to Direct a Verdict* (1914) 24 YALE L. J. 127; and Galloway v. United States, 63 Sup. Ct. 1077, 1086 fn. 19, 1093 (1943).
37. *Supra* note 4.

for new trial, which, of course, were the classical modes of challenging the sufficiency in law of plaintiff's evidence. His argument, as summarized by the court, was "that the directed verdict as now administered differs from both those procedures because, on the one hand, allegedly higher standards of proof are required and, on the other, different consequences follow as to further maintenance of the litigation. . . . that in 1791, a litigant could challenge his opponent's evidence, either by the demurrer, which when determined ended the litigation, or by motion for a new trial which if successful, gave the adversary another chance to prove his case; and therefore the Amendment excluded any challenge to which one or the other of these consequences does not attach".[38]

The argument was ingenious and adroit analysis was required to answer it. This was supplied in one brilliant paragraph by Mr. Justice Rutledge, speaking as follows for the majority: "It may be doubted that the Amendment requires challenge to an opponent's case to be made without reference to the merits of one's own and at the price of all opportunity to have it considered. On the other hand, there is equal room for disbelieving it compels endless repetition of litigation and unlimited chance, by education gained at the opposing party's expense, for perfecting a case at other trials. The essential inconsistency of these alternatives would seem sufficient to refute that either or both, to the exclusion of all others, received constitutional sanctity by the Amendment's force. The first alternative, drawn from the demurrer to the evidence, attributes to the Amendment the effect of forcing one admision because another and an entirely different one is made, and thereby compels conclusion of the litigation once and for all. The true effect of imposing such a risk would not be to guarantee the plaintiff a jury trial. It would be rather to deprive the defendant (or the plaintiff if he were the challenger) of that right; or, if not that, then of the right to challenge the legal sufficiency of the opposing case. The Amendment was not framed or adopted to deprive either party of either right. It is impartial in its guaranty of both. To posit assertion of one upon sacrifice of the other would dilute and distort the full protection intended. The admitted validity of the practice on the motion for a new trial goes far to demonstrate this. It negatives any idea that the challenge must be made at such a risk as the demurrer imposed. As for the other alternative, it is not urged that the Amendment guarantees another trial whenever challenge to the sufficiency of evidence is sustained . . .. That argument, in turn, is precluded by the practice on demurrer to the evidence." [39] As to the objection that a higher standard of proof is required to avoid a directed verdict than to defeat a demurrer to the evidence, Mr. Justice Rutledge had the following to say: "It hardly affords help to insist upon 'substantial evidence' rather than 'some evidence' or 'any evidence', or vice versa. The matter is essentially one to be worked out in particular situations and for particular types of cases. Whatever may be the general formulation, the essential requirement is that mere speculation be not allowed to do duty for probative facts, after making due allowance for all reasonably possible inferences favoring the party whose case is attacked. The mere difference in labels used to describe this standard, whether it is applied under the demurrer to the evidence or on motion for a directed verdict, cannot amount to a departure from 'the rules of the common law' which the Amendment requires to be followed." [40]

38. At 1087.
39. At 1088-1089.
40. At 1089-1090.

The majority voted to approve the directed verdict for defendant. Mr. Justice Black, speaking for the three Justices who dissented, thought that the plaintiff had made a case for the jury. He also made some interesting observations on the Seventh Amendment. He referred to the decision of the majority as marking "a continuation of the gradual process of judicial erosion which in one hundred fifty years has slowly worn away a major portion of the essential guarantee" [41] of the Amendment. He quoted [42] with apparent approval the statement on which Mr. Justice Van Devanter relied in the *Slocum* case and later repudiated in the *Baltimore & Carolina Line* case;[43] namely, that "the only modes known to the common law to re-examine . . . facts [found by the jury], are the granting of a new trial by the court where the issue was tried, or to which the record was properly returnable; or the award of a venire facias de novo, by an appellate court, for some error of law which intervened in the proceedings." He referred with apparent disapproval to the power of federal judges to comment to the jury on the evidence,[44] to the remittitur practice,[45] and to the practice of directing verdicts, all as episodes in a story which "depicts the constriction of a constitutional civil right".[46] He assumed without deciding "that the adoption of the Seventh Amendment was meant to have no limiting effect on the contemporary demurrer to evidence practice",[47] but denounced the invention of the directed verdict as "a long step toward the determination of fact by judges instead of by juries".[48] "This new device", he said, "contained potentialities for judicial control of the jury which had not existed in the demurrer to the evidence",[49] because, he said: "In the first place, demurring to the evidence was risky business; . . . upon joinder in demurrer the case was withdrawn from the jury while the court proceeded to give final judgment either for or against the demurrant. Imposition of this risk was no mere technicality; for by making withdrawal of a case from the jury dangerous to the moving litigant's cause, the early law went far to assure that facts would never be examined except by a jury. Under the directed verdict practice the moving party takes no such chance, for if his motion is denied, instead of suffering a directed verdict against him, his case merely continues into the hands of the jury . . . In the second place, under the directed verdict practice the courts, . . . permitted directed verdicts even though there was far more evidence in the case than a plaintiff would have needed to withstand a demurrer." [50] In support of the second statement the Justice referred to "the traditional rule that juries might pass finally on facts if there was 'any evidence' to support a party's contention". He said that this "rule was given an ugly name, 'the scintilla rule', to hasten its demise", and this demise was brought about when "the Court declared that 'some' evidence was not enough—there must be evidence sufficiently persuasive to the judge so that he thinks 'a jury can properly proceed'." [51] This latter rule was dubbed the "substantial evidence rule".[52]

41. At 1090.
42. At 1092.
43. *Supra* notes 6 and 20.
44. At 1092.
45. At 1094 fn. 17.
46. At 1095.
47. At 1092 fn. 7.
48. At 1093.
49. *Ibid.*
50. At 1093-1094.
51. At 1094.
52. *Ibid.*

The Justice apparently thought that the scintilla rule was applied on demurrer to the evidence and the "substantial evidence rule" on directed verdict, and hence "under the directed verdict practice the courts permitted directed verdicts even though there was far more evidence in the case than a plaintiff would have needed to withstand a demurrer". This is believed to be an erroneous impression. Classically, the substantial evidence rule was applied in cases of a demurrer. It was settled that a demurrer to the evidence admits only "whatever the jury may reasonably infer from the evidence".[53] Thus, to defeat a demurrer "some" evidence was not enough. There must be evidence sufficiently persuasive to the judge so that he thinks a jury can reasonably infer the truth of plaintiff's contentions. The scintilla rule was therefore not the creature of the common law demurrer to the evidence and the suggestion that it should have been retained because of the Seventh Amendment is misleading.

In concluding his general observations Mr. Justice Black admonished that "the call for the true application of the Seventh Amendment is not to words, but to the spirit of honest desire to see that Constitutional right preserved".[54] Nevertheless he offered his own verbal formulation as follows: "As for myself, I believe that a verdict should be directed, if at all, only when, without weighing the credibility of the witnesses, there is in the evidence no room whatever for honest difference of opinion over the factual issue in controversy."[55] The only material difference between this and the statement of the majority that "the esential requirement is that mere speculation be not allowed to do duty for probative facts after making due allowance for all reasonably possible inferences favoring the party whose case is attacked"[56] is that the majority omits the prohibition against weighing the credibility of witnesses. Nevertheless the plaintiff has no ground for complaint on this score, for Mr. Justice Rutledge concludes by saying: "We hardly need add that we give full credence to all of the testimony."[57]

It should be observed, however, that in the case under discussion the directed verdict was against the party carrying the burden of proof; and since that party's witnesses were believed by the court, and the other party was seeking the ruling of the court, no question was raised as to the court's usurping the functions of the jury by weighing the credibility of the witnesses. An entirely different situation is presented when the directed verdict is for the party carrying the burden. The other party is then no longer seeking the ruling of the court and may plausibly object that the court, rather than the jury, is passing upon the credibility of his adversary's witnesses. In this situation the difference between the formulations for the majority and dissent would become material.[58]

Cases like those under consideration do not lend themselves to summary by way of generalization. Nevertheless it may be said that perhaps the most striking characteristic common to all of them is the extent to which they give a practical application to legal history. What is generally con-

53. Fowle v. Alexandria, 11 Wheat. 320, 323 (1826).

54. At 1095-1096.

55. At 1096.

56. At 1089.

57. At 1090.

58. As to the present state of the authorities on the question whether federal courts can direct a verdict for the party having the burden of proof, see, 9 WIGMORE, EVIDENCE (3d ed. 1940) § 2495, fn. 8; 3 MOORE, FEDERAL PRACTICE (1938) § 50.01; SMITH, *The Power of the Judge to Direct a Verdict: Section 457-a of the New York Civil Practice Act* (1924) 24 COL. L. REV. 111, 118.

sidered a subject of only academic interest here becomes of actual significance in deciding the content of an important constitutional right. Court and counsel are called upon for exhaustive research in the sources of common law pleading and practice, not merely as antiquarians satisfying a scholarly interest but as participants in deciding actual cases. Since the Seventh Amendment has imposed the mortmain of the common law upon procedures affecting trial by jury the interpretation of the Amendment calls for skill of a high order in dealing with the source materials of history. Wisdom of a like order is also called for to determine which features of ancient practice are substance protected by the Amendment and which are form excluded from its protection. What Maitland said of the common law forms of action applies here with equal force to common law pleading and practice. Though buried, "they still rule us from their graves".[59]

James H. Chadbourn.

59. MAITLAND, EQUITY, ALSO THE FORMS OF ACTION AT COMMON LAW (1909) 296.