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## The Decline of Anglo-American Civil Jury Trial Practice

William V. Dorsaneo III

*Southern Methodist University, Dedman School of Law, wdorsane@mail.smu.edu*

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# THE DECLINE OF ANGLO-AMERICAN CIVIL JURY TRIAL PRACTICE

*William V. Dorsaneo, III\**

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## I. INTRODUCTION

**T**HIS article provides a brief historical explanation of the role that juries have played in Anglo-American civil trial practice. In doing so, the article documents the rise and fall of jury trial practice as a mechanism for resolving civil disputes in both England and America. The article explains how the modern rules of procedure and procedural statutes promote resolving disputes through pretrial litigation procedures at the expense of resolving disputes by jury trial.

The article begins with a description of the use of juries in England at the end of the twelfth century and continues until the near disappearance of juries in civil cases in England in the second half of the twentieth century. The article continues with the adoption and interpretation of the Seventh Amendment in America by the First Congress and a description

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\* Chief Justice John and Lena Hickman Distinguished Faculty Fellow and Professor of Law, Dedman School of Law, Southern Methodist University.

of developments in American states, and it ends with the transformation of civil trial practice into modern litigation. The article makes a prediction that the American trial practice will continue to follow England's lead, moving further away from resolving civil disputes by jury trials.

In England and its colonies, before and after independence from the British Empire in 1776, civil and criminal cases were adjudicated by jury trials, and a jury was a traditional "English right." This right was regarded as a safeguard of the public's civil and political liberties on a par with the right to vote and representative government.

But as explained below, by the end of the twentieth century, jury trial practice in civil cases in England was abolished by statute in most cases.<sup>1</sup> Similarly, despite the adoption of the Seventh Amendment to the Constitution in America and of a constitutional right to jury trial by every American state, except Louisiana,<sup>2</sup> by the twenty-first century, the use of jury trials to resolve civil disputes in America had declined, and jury trials had largely vanished.<sup>3</sup>

## II. THE TRADITIONAL RELATIONSHIP OF THE PLEADING AND TRIAL STAGES OF CIVIL TRIAL PRACTICE

Beginning around the end of the twelfth century, for most of its long history, civil trial practice in jury cases in England and in state and federal courts in America generally began, and still begins today, with a pleading stage during which the parties exchanged pleadings and alleged their claims and defenses. For centuries, the pleading stage was followed by the trial stage during which the jury rendered its verdict. During parts of this period, the common law system of "issue pleading" was used by the parties in the common law courts (Common Pleas, King's Bench, and Exchequer) in England. Issue pleading was designed to define the judicial controversy until the exchange of pleadings produced a single issue of law or fact, without providing for the disclosure or discovery of witnesses, documents, or other evidence before trial.<sup>4</sup>

By contrast, alongside this "single-issue" pleading practice, a plea called the "general issue" could often be used to put the entire case at issue and to avoid all of the later pleadings.<sup>5</sup> Separate forms of general

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1. See *infra* Part III.

2. *Usner v. Strobach*, 591 So. 2d 713, 721 (La. Ct. App. 1991) ("There is no United States or Louisiana constitutional right to a trial by jury in a civil case in a Louisiana court; this right is provided for by statute.") (emphasis omitted) (citing LA. CODE CIV. PROC. ANN. arts. 1731–1814 (1983)).

3. See DENNIS HALE, *THE JURY IN AMERICA: TRIUMPH AND DECLINE* 327–65 (2016); see also Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUD. 459, 460, 462–63 (2004); see also *infra* Part X.

4. See J. H. BAKER, *AN INTRODUCTION TO ENGLISH LEGAL HISTORY* 76–79 (4th ed. 2002).

5. See HENRY JOHN STEPHEN, *A TREATISE ON THE PRINCIPLES OF PLEADING IN CIVIL ACTIONS: COMPRISING A SUMMARY VIEW OF THE WHOLE PROCEEDINGS IN A SUIT AT LAW* 168–70 (3d ed. 1882).

issue pleas could be pleaded for separate forms of action: “for trespass [battery] or case [negligence], not guilty; for debt on simple contract, nil debet; for assumpsit, non assumpsit; and so on.”<sup>6</sup>

Neither form of common law pleading practice provided the parties with fair notice of the facts of the claims and defenses that would be presented to a jury at trial.<sup>7</sup>

In the early nineteenth century, Parliament adopted the New Pleading Rules of Hilary Term. The “Hilary Rules” drastically restricted the availability of the general issue form, resulting in an unfortunate return to special pleading practice, despite its flaws, much to the dissatisfaction of the English legal profession.<sup>8</sup> As a result, the common law pleading system was ultimately replaced by the Judicature Acts of 1873–1875. In general terms, these Acts required the plaintiff to plead a claim, “stating briefly the facts on which he relied and what relief he claimed. The defendant was then to make a brief statement of his defence [sic] . . . , provided that he did not merely deny generally all the facts in the statement of claim.”<sup>9</sup>

By the later twentieth century, rules of court became subject to “regular revision by the judges.”<sup>10</sup> This ultimately resulted in a recognition of the importance of the pre-trial phase of litigation for the conduct of pre-trial discovery and for preservation of evidence.<sup>11</sup> Similarly, in the United States, dissatisfaction with common law pleading practices led to the development of a system of “fact pleading” generally identified as the “Field Code,” which was adopted in New York in 1848.<sup>12</sup> According to Dean Charles Clark, by 1875, twenty-four American states had adopted this system, and by the 1930s, most American States had done so.<sup>13</sup>

### III. DEMISE OF CIVIL JURY TRIAL PRACTICE IN ENGLAND

The use of juries to decide civil cases began in England around the end of the twelfth century. As civil jury trial practice developed, issues raised by the pleadings were determined by the presentation of evidence and argument during the trial stage of a jury trial. Juries consisted of twelve or more men from the vicinity of where the matter in question occurred. Thus, in a trespass action in which the defendant pleaded “[n]ot guilty—a writ of *venire facias* was sent to the sheriff commanding him to cause

6. FLEMING JAMES, JR. & GEOFFRY C. HAZARD, JR., *CIVIL PROCEDURE* § 4.4 (3d ed. 1985) (discussing the answer and reply).

7. See John H. Langbein, *The Disappearance of Civil Trial in the United States*, 122 *YALE L.J.* 522, 532–53 (2012) (“In American civil procedure before the Federal Rules, ‘trial was often the only real way to do discovery . . . .’”) (quoting Stephen C. Yeazell, *Getting What We Asked for, Getting What We Paid for, and Not Liking What We Got: The Vanishing Civil Trial*, 1 *J. EMPIRICAL LEGAL STUD.* 943, 951 (2004)).

8. See J. H. BAKER, *AN INTRODUCTION TO ENGLISH LEGAL HISTORY* 88–90 (4th ed. 2002).

9. See *id.* at 91.

10. See *id.*

11. See *id.* at 93–95.

12. See CHARLES E. CLARK, *HANDBOOK OF THE LAW OF CODE PLEADING* 21–24 (2d ed. 1947).

13. See *id.* at 22–24.

twelve men of the neighbourhood, unrelated to the parties, to come before the court to ‘make recognition’: that is, to enquire into the matter and state the truth therein.”<sup>14</sup>

At first, these men based their verdict on their own private knowledge.<sup>15</sup> By the late fourteenth century, the parties commonly used witnesses to testify at trial.<sup>16</sup> As late as 1670, in the famous *Bushell’s Case*, the court ruled that juries could bring their knowledge to bear on a decision, even when testimonial evidence was also presented in court.<sup>17</sup> “But less than one hundred years later, jurors were prohibited from bringing personal knowledge to bear on their decisions.”<sup>18</sup>

Until 1854, the jury was the prescribed method of trying cases in the common law courts.<sup>19</sup> As explained in the next section of this paper, the Common Law Procedure Act of 1854 allowed the parties, by consent, the option to have trial judges conduct bench trials.

By the middle of the twentieth century, the English civil jury trial had virtually disappeared. Jury trials are available only in a handful of civil cases today.<sup>20</sup>

Lord Patrick Devlin’s monograph<sup>21</sup> describes the method of trying civil cases to juries before its virtual abandonment in England. With certain exceptions, this method very strongly resembled the methods used today in conventional trials in American courts.<sup>22</sup> Devlin’s monograph also summarized the decline and demise of jury trials in civil cases in England in the nineteenth and twentieth centuries.

- **1854, Common Law Procedure Act.** For centuries, trial by jury was the only form of trial used in any common law action in the King’s courts. But in 1854, the enactment of the Common Law Procedure Act provided that trial by judge alone could be had by consent of both parties. The same Act empowered the trial judge to refer matters of account for determination by a judge or referee in such cases.<sup>23</sup>
- **1873, Judicature Act.** As a result of the enactment of the 1873 Judicature Act, which also enacted complete fusion of law and equity

14. See J. H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 72–73 (4th ed. 2002).

15. See JAMES BRADLEY THAYER, A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW 47–49 (1898).

16. See *id.* at 102.

17. See ELLEN E. SWARD, THE DECLINE OF THE CIVIL JURY 75 (2001).

18. *Id.* at 75.

19. See PATRICK DEVLIN, TRIAL BY JURY 130–31 (1966).

20. See CONOR HANLY, *The Decline of Civil Jury Trial in Nineteenth-Century England*, 26 J. LEGAL HIST. 253, 253 (2005); see also JAMES DRISCOLL, *The Decline of the English Jury*, 17 AM. BUS. L. J. 99, 107 n.58 (1979) (noting that civil jury trials were still available in England at the end of the twentieth century for cases of “fraud, libel, slander, malicious prosecution and false imprisonment” but that English courts could deny a jury trial in these actions).

21. See generally PATRICK DEVLIN, TRIAL BY JURY (1966).

22. See *id.* at 116–21.

23. *Id.* at 130.

for actions in the King's courts, so-called "prolonged examination cases" could be referred to a referee for "matters requiring prolonged examination of documents or accounts or any scientific or local investigation."<sup>24</sup>

- **1883 (R.S.C. Ord. 36).** In 1883, in "libel, slander, malicious prosecution, false imprisonment, seduction and breach of promise of marriage" cases, "trial by jury continued to be obtainable as a matter of course, but in all other cases it had to be specially asked for. . . . Later, the procedure was tightened by requiring the application for a jury to be made within a fixed time limit."<sup>25</sup>
- **1918, Juries Act.** "In 1918, the right to jury was abolished except in seven cases, . . . the six cases previously enumerated together with cases of fraud; in all other cases trial by jury was made discretionary." This "emergency legislation [was] designed to expire six months after the end of the war, but when it did expire, it was replaced by another Act [(Administration of Justice Act), which was] intended to be permanent." As explained by Lord Devlin, toward the end of the Great War of 1914–1918, "jurors were no longer easily available."<sup>26</sup>
- **1920, Administration of Justice Act.** In 1920, the Administration of Justice Act replaced the Juries Act of 1918. The Administration of Justice Act made the provisions of the 1918 Juries Act permanent. Lord Devlin explains that "[a]s a permanent alteration [widespread abolition of jury trials in most civil cases] was not well received; indeed, it was criticiz[ed] so severely that in 1925 Parliament" reversed course and restored the right to jury trial as an option in all cases if "specially asked for" by a party.<sup>27</sup>
- **1925, Supreme Court of Judicature (Consolidation) Act.** "[I]n 1925, Parliament restored the *status quo ante* 1918. But the restoration was not long lived."<sup>28</sup>
- **1933, Administration of Justice Act.** "In 1933, as part of a drive for cheaper litigation, Parliament substantially re-enacted the 1920 [Administration of Justice] Act," which curtailed the use of juries in civil cases, with the exception of cases of libel, slander, malicious prosecution, false imprisonment, seduction, the breach of the promise of marriage, and fraud. Lord Devlin explains that the chief alteration made by the 1933 Act was "that the right to a jury in cases of fraud was granted only to the party charged."<sup>29</sup> In other cases, the Administration of Justice Act of 1933 granted trial judges discretion to grant jury trials under a rule of civil procedure.<sup>30</sup>

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24. *Id.*

25. *Id.* at 130–31.

26. *Id.* at 131.

27. *Id.*

28. *Id.*

29. *Id.*

30. *See id.* at 130 n.5 (citing R.C.S., Ord. 36, r.1).

- **Ward v. James, All ER 563.** Until the Court of Appeal's 1965 decision in *Ward v. James*, the trial court's discretion was regarded as more or less unfettered.<sup>31</sup> But in *Ward v. James*,<sup>32</sup> the Court of Appeal decided that absent "extraordinary circumstances," personal injury cases should be decided by judges without the existence of a jury. Lord Denning (Master of the Rolls) reasoned that having judges rather than jurors assess damages improved the uniformity and predictability of damage awards.<sup>33</sup> Subsequent decisions usually followed the same analysis.
- **The Supreme Court Act of 1981.** Ultimately the Supreme Court Act of 1981 "permits a right to jury trial only in cases of defamation, malicious prosecution, fraud, and false imprisonment."<sup>34</sup>

Lord Devlin's history strongly suggests that the effects of the First World War (1914–1918) "provided a good ground for at least a temporary change [in civil trial practice] . . . and the war of 1939–1945 completed the debacle."<sup>35</sup> Other scholars have suggested that "the steady decline in the use of the civil jury across the nineteenth and twentieth centuries resulted from the choices of litigants and their lawyers, who chose not to use it."<sup>36</sup>

#### IV. PRE-1787 DEVELOPMENT OF THE AMERICAN JURY SYSTEM

"It is difficult to overstate the support for the jury system, both criminal and civil, among eighteenth-century Americans. Along with the principle of representation in the legislature, juries were understood [by these Americans] to be an essential part of any free government."<sup>37</sup>

Prior to the adoption of the Constitution, civil jury trials were widespread. By 1778, ten of the thirteen colonies had adopted new colonial constitutions in response to a resolution adopted by the delegates to the Continental Congress urging the colonies to write new constitutions in contemplation of dissolving the connection with Great Britain.<sup>38</sup> "Most of the new constitutions included specific guarantees of jury trials in criminal cases, . . . [but] only six of the new state constitutions specifically protected the right to a jury trial in civil cases: Georgia, Massachusetts, North Carolina, Pennsylvania, Virginia, and Maryland."<sup>39</sup>

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31. See, e.g., *Hennell v. Ranaboldo* [1963] 3 All ER 684 at 684 (Eng.) ("There is no doubt that the matter is completely in the discretion of the judge.").

32. *Ward v. James* [1965] 1 All ER 563 at 568–70 (Eng.).

33. See *Ward*, 1 All ER 563 at 563, 572–574.

34. Conor Hanly, *The Decline of Jury Trial in Nineteenth-Century England*, 26 J. LEGAL HIST. 253, 278 n.189 (2006).

35. See DELVIN, *supra* note 19, at 131–32.

36. See JOHN H. LANGBIEN, *HISTORY OF THE COMMON LAW: THE DEVELOPMENT OF ANGLO-AMERICAN LEGAL INSTITUTIONS* 464 (2009); see also Hanly, *supra* note 34, at 278.

37. DENNIS HALE, *THE JURY IN AMERICA: TRIUMPH AND DECLINE* 60 (2016).

38. See *id.* at 66.

39. See *id.* at 67–68.

The jury system was itself regarded as a “powerful obstacle to tyranny.”<sup>40</sup> As explained by Professor Dennis Hale:

[The jury] was an institution in which ordinary citizens could stand against judges, prosecutors, and even the monarch himself, refusing to convict a subject either unfairly charged or charged with behavior (criticizing officials, for example) that jurors believed should not be considered a crime among free men. The jury could perform this service because of its right to bring in a “general verdict,” conflating judgment on the evidence and judgment on the law into one complex result, the separate parts of which could not be isolated for inspection.<sup>41</sup>

For a time, the power of jurors to decide the law and to disregard the court’s instructions was widely accepted.<sup>42</sup> This power of jurors to decide the law did not last, however. Ultimately, “by the 1820[s], the jury’s power over law had all but disappeared.”<sup>43</sup>

## V. THE ADOPTION OF THE CONSTITUTION IN 1787

At the Philadelphia Convention of 1787, the subject of the right to jury trial in civil cases was not even raised by anyone until shortly before the scheduled adjournment of the Convention.<sup>44</sup> At that point, a group of delegates (known to us as the antifederalists) raised the absence of a Bill of Rights in the proposed Constitution “by an objection that the document under consideration lacked a specific guarantee of jury trial in civil cases.”<sup>45</sup>

Five days before the Convention was to adjourn, Hugh Williamson, a North Carolina delegate, raised the objection “to the lack of guarantee of a civil jury trial.”<sup>46</sup> By this time in the process, however, the delegates concluded that it was too late and too hot in the summer of 1787 in Philadelphia to draft a Bill of Rights.<sup>47</sup> As explained by Professor Wolfram:

In the end, the [federalist] defenders of the proposed constitution were reduced almost entirely to defending the omission of a guarantee of jury trial as a [drafting problem that] . . . would be disposed of by appropriate legislation as one of the first items of business of the new Congress. This assurance was asserted amidst a chorus of feder-

40. *See id.* at 60.

41. *See id.*

42. *See, e.g.,* *Georgia v. Brailsford*, 3 U.S. 1, 9–10 (1794).

43. *See* Matthew P. Harrington, *The Law-Finding Function of the American Jury*, 1999 WIS. L. REV. 377, 377–81 (1999); *see also* Edith G. Henderson, *The Background of the Seventh Amendment*, 80 HARV. L. REV. 289, 299–300 (1966) (“The elusiveness of the question whether juries could ‘decide the law’ [is related to] . . . what used to be called ‘mixed questions of law and fact’ such as negligence, in which inferences as to the legal effect of physical facts are often but not always left to the jury.”). For additional coverage of mixed questions, *see infra* Part IX.

44. Charles W. Wolfram, *The Constitutional History of the Seventh Amendment*, 57 MINN. L. REV. 639, 657–58 (1973).

45. *Id.* at 657.

46. *Id.* at 658–59.

47. *Id.* at 660–61.



alist disclaimers of any intent to limit jury trial in civil cases in the proposed federal courts. . . .

[T]he antifederalists advanced several distinct and specific arguments in favor of civil jury trial: the protection of debtor defendants; the overturning of the practices of courts of vice-admiralty; the vindication of the interests of private citizens in litigation with the government; and the protection of litigants against overbearing and oppressive judges.<sup>48</sup>

On September 17, 1787, the Constitution was signed by thirty-nine of the fifty-five delegates attending the Philadelphia Convention.<sup>49</sup> Three delegates dissented; Thomas Jefferson and John Adams did not sign due to service abroad as ambassadors to France and Great Britain, respectively.<sup>50</sup>

## VI. PROPOSED AMENDMENTS AND THE BILL OF RIGHTS

The jury debate about proposed amendments and a Bill of Rights continued in the state ratifying conventions. “In total, the state ratifying conventions proposed . . . nearly 100 different amendments . . . .”<sup>51</sup> Thereafter, on June 8, 1789, Representative James Madison proposed eight “articles of amendment.”<sup>52</sup> Debate on Madison’s proposed amendments was postponed until a draft of the amendments was reported by a congressional Committee of Eleven (only North Carolina and Rhode Island were not represented) on July 28, 1789.<sup>53</sup> On September 25, 1789, Congress approved twelve articles of amendment and submitted them to the states for ratification.<sup>54</sup> Articles Three through Twelve were ratified on December 15, 1791, and became Amendments One through Ten of the Constitution.<sup>55</sup>

Two of Madison’s proposed amendments concerned the right to jury trials in civil cases as follows:

That, in article 3d, section 2, . . . [add] these words to wit:

“But no appeal to such court shall be allowed where the value in controversy shall not amount to \_\_\_\_ dollars; nor shall any fact triable by jury, according to the course of common law, be otherwise re-examinable than may consist with the principles of common law.”

. . . [That, in] article III, section 2, . . . [add the following words]:

48. *See id.* at 666, 670–71.

49. *See* RICHARD BEEMAN, PLAIN, HONEST MEN: THE MAKING OF THE AMERICAN CONSTITUTION 429–30 (2009).

50. *See id.* at 363.

51. DENNIS HALE, THE JURY IN AMERICA: TRIUMPH AND DECLINE 84 (2016).

52. *See id.*

53. *See id.* at 85.

54. Wolfram, *supra* note 44, at 725–26.

55. *Id.* at 725–26.

“In suits at common law, between man and man, the trial by jury, as one of the best securities to the rights of the people, ought to remain inviolate.”<sup>56</sup>

## VII. JUDICIARY ACT OF 1789

The Judiciary Act of 1789 also granted power to juries to try “issues in fact, in the district courts, in all causes except civil causes of admiralty and maritime jurisdiction.”<sup>57</sup> The Judiciary Act also provided: “[T]he trial of issues in fact in the circuit courts shall, in all suits, except those of equity, and of admiralty, and maritime jurisdiction, be by jury.”<sup>58</sup>

## VIII. THE JUDICIAL INTERPRETATION OF THE SEVENTH AMENDMENT

As adopted by Congress in 1789 and ratified by the States in 1791, the Seventh Amendment states: “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.”<sup>59</sup>

In determining whether the Seventh Amendment requires that a jury be empaneled to decide cases, the federal courts have used a historical test purportedly based on the practice in English courts in 1791.<sup>60</sup> As explained by Professor Wolfram, this “historical test” extends beyond whether a jury is required and into the respective roles of judges and juries, whether the verdict must be unanimous, and whether juries with less than twelve members are permissible.<sup>61</sup> “English practice in 1791 determines all.”<sup>62</sup>

Although academic focus has concentrated on the existence of the right to trial by jury under the first (“preservation”) clause of the Seventh Amendment, the central characteristic of the right to trial by jury is addressed more directly by the Reexamination Clause. Indeed, in 1830, Justice Story characterized the Reexamination Clause as “more important” than the remainder of the Seventh Amendment precisely because it was then believed to preclude reexamination of jury verdicts under English procedure in civil damage actions at common law by reviewing courts on appeal.<sup>63</sup> As explained below, despite the fact that the Reexamination

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56. *Id.* at 726–28.

57. Judiciary Act of 1789, ch. 20, §§ 9, 17, 1 Stat. 73, 76–77, 83.

58. *Id.* at § 12. *See also* SUJA A. THOMAS, *THE MISSING AMERICAN JURY: RESTORING THE FUNDAMENTAL CONSTITUTIONAL ROLE OF THE CRIMINAL, CIVIL, AND GRAND JURIES* 112 (2016).

59. U.S. CONST. amend. VII.

60. *See* Charles W. Wolfram, *The Constitutional History of the Seventh Amendment*, 57 MINN. L. REV. 639, 639–640 (1973).

61. *See id.*

62. *See id.* at 640; *see also* *Dimick v. Schiedt*, 293 U.S. 474, 476 (1935).

63. *See* *Parsons v. Bedford*, 28 U.S. 433, 447–48 (1830).

Clause was initially interpreted to mean what its name still suggests, a series of Supreme Court cases ultimately changed the meaning of the Re-examination Clause.

The early cases interpreting the Reexamination Clause settled the concept that the common law mentioned in the Reexamination Clause “is not the common law of any individual state, . . . but it is the common law of England” as of 1791.<sup>64</sup>

The [Seventh Amendment of the] Federal Constitution guarantees the right to jury trial in civil actions in federal courts, and nearly every state constitution contains a similar guaranty. . . . They do not extend but preserve the right of jury trial as it existed in English history . . . in 1791 when the Seventh Amendment was adopted . . . .<sup>65</sup>

Unfortunately, the scope of reexamination of jury verdicts by reviewing courts in England in 1791 was not so clear in the nineteenth and twentieth centuries, as shown by subsequent Supreme Court decisions.

At first, in *Parsons v. Bedford*, the plaintiff brought an action for debt for damages against William Parsons in the Parish Court of New Orleans. The case was removed to the United States District Court for the Eastern District of Louisiana. The defendant pleaded a general traverse (nil debit) coupled with a petition of reconvention (counterclaim). The case was tried to a jury, which rendered a verdict for the plaintiffs. Bedford moved for a new trial based on several defenses. The trial court denied the motion for new trial and rendered judgment on the verdict. On writ of error, the defendant challenged the jury’s findings.<sup>66</sup>

Based on the Seventh Amendment’s Reexamination Clause, the Supreme Court affirmed the judgment of the district court.<sup>67</sup> After explaining that the Reexamination Clause is a “substantial and independent clause” that is “still more important” than the Preservation Clause, the Supreme Court reasoned as follows:

This [Reexamination Clause] is a prohibition to the courts of the United States to re-examine any facts tried by a jury in any other manner. 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, or to which the record was properly returnable; or the award of a venire facias de novo [a remand for a new trial], by an appellate court, for some error of law which intervened in the proceedings.<sup>68</sup>

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64. See *United States v. Wonson*, 28 F. Cas. 745, 750 (C.C.D. Mass. 1812) (No. 16,750); see also *Baltimore & Carolina Line, Inc. v. Redman*, 295 U.S. 654, 657 (1935) (holding that the Reexamination Clause “not only preserves that right [to trial by jury] but discloses a studied purpose to protect it from indirect impairment through possible enlargements of the power of reexamination existing under the common law”).

65. FLEMING JAMES, JR. & GEOFFRY C. HAZARD, JR., *CIVIL PROCEDURE* § 8.1 (3d ed. 1985) (discussing the Seventh Amendment).

66. See *Parsons*, 28 U.S. at 441–42.

67. See *id.* at 449.

68. See *id.* at 447–48.

In 1913, in *Slocum v. New York Life Insurance Company*, the Supreme Court held that entry of judgment notwithstanding the verdict by the trial court based on the insufficiency of the plaintiff's evidence violated the Reexamination Clause of the Seventh Amendment.<sup>69</sup> This holding rests on the Court's examination of the leading English cases and the Court's conclusion that under English law in 1791, "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 reexamined otherwise than on a new trial."<sup>70</sup>

But in 1935, in *Redman*, the Supreme Court reversed course and ruled that because a district court had expressly reserved its decision on motions for judgment as a matter of law made during the trial before the rendition of the jury's verdict, the submission of the case to the jury subject to the reservation technically did not violate the Reexamination Clause.<sup>71</sup>

In *Redman*, the Supreme Court ruled that a similar practice was recognized in 1791 under English common law, and evidentiary review following this procedure did not violate the Seventh Amendment's Reexamination Clause because at the time the reservation was made there was no jury verdict to reexamine.<sup>72</sup>

Less than a decade later, in *Galloway v. United States*, the Supreme Court ruled more candidly that the trial court has the power to render judgment as a matter of law if the evidence presented is legally insufficient because reasonable minds could not differ on how vital facts would be determined under the record evidence.<sup>73</sup> Even more significantly, in *Galloway*, the Supreme Court minimized the importance of English practice in 1791 as follows:

[T]he passage of time has obscured much of the procedure which then [1791] may have had more or less definite form, even for historical purposes.

. . . [T]he Amendment was designed to preserve the basic institution of jury trial in only its most fundamental elements, not the great mass of procedural forms and details, varying even then [1791] so widely among common-law jurisdictions.

Apart from the uncertainty and the variety of conclusion which follows from an effort at purely historical accuracy, the consequences flowing from the view asserted [i.e., requiring a new trial rather than judgment as a matter of law] are sufficient to refute it.<sup>74</sup>

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69. *Slocum v. New York Life Ins. Co.*, 228 U.S. 364, 398–99 (1913).

70. *Id.* at 392.

71. *See Baltimore & Carolina Line, Inc. v. Redman*, 295 U.S. 654, 658–59 (1935).

72. *See id.* at 659; *see also* FED. R. CIV. P. 50(b) (substituting a procedural reservation for the reservation that distinguished *Slocum* from *Redman*).

73. *See Galloway v. United States*, 319 U.S. 372, 390–93 (1943).

74. *See id.*

The *Galloway* Court's "interpretation" of the Seventh Amendment is difficult to square with the text of the provision.<sup>75</sup> Nonetheless, many academic commentators have approved *Galloway's* functional interpretation of the Seventh Amendment.<sup>76</sup> More recently, in *Gasperini v. Center for Humanities, Inc.*, the Supreme Court also interpreted the Reexamination Clause in the context of the constitutional ability of federal courts to conduct weight of the evidence review of jury findings.<sup>77</sup>

*Gasperini* is a diversity case in which Gasperini, who had loaned 300 original slide transparencies to the Center for Humanities, sued the Center for damages for the loss of the transparencies under various state law claims, including breach of contract, negligence, and conversion.<sup>78</sup> The case was tried to a jury which awarded Gasperini \$450,000 in compensatory damages.<sup>79</sup> The Center attacked the verdict on a number of grounds, including excessiveness of the damage award.<sup>80</sup> The district court denied the Center's motion for a new trial. On appeal, the Second Circuit vacated the district court's judgment by holding that the \$450,000 verdict "materially deviates from what is reasonable compensation" in violation of a statutory standard prescribed by a New York statute.<sup>81</sup> The court of appeals set aside the verdict and ordered a new trial unless Gasperini agreed to a remittitur to an award of \$100,000.<sup>82</sup>

The Supreme Court granted certiorari on the question of what standard a federal court must use to evaluate the alleged excessiveness of a jury verdict based on state law in a diversity case. This question implicated the interpretation of the Seventh Amendment's Reexamination Clause in both the federal district court and on appeal.

After explaining that the Seventh Amendment does not preclude federal district courts from granting new trials if the verdict is against the weight of the evidence,<sup>83</sup> the remaining issue was whether the court of appeals could review and set aside the district court's denial of a new trial on the ground of excessiveness.

A bare majority of the Supreme Court held that neither the Seventh Amendment nor prudential concerns barred a federal circuit court from setting aside a jury verdict and granting a new trial if the verdict is against the weight of the evidence. The Court further held that nothing in the Seventh Amendment precludes appellate review of a trial judge's denial

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75. See 11 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE § 2819 (2d ed. 1995); see also Suja A. Thomas, *Re-Examining the Constitutionality of Remittitur Under the Seventh Amendment*, 64 OHIO ST. L.J. 731, 751-52 (2003).

76. See, e.g., Patrick Woolley, *Mass Tort Litigation and the Seventh Amendment Reexamination Clause*, 83 IOWA L. REV. 499, 504-506 (1998); see also Edward Brunet, *Summary Judgment Is Constitutional*, 93 IOWA L. REV. 1625, 1628-31 (2008).

77. See *Gasperini v. Ctr. for Humanities, Inc.*, 518 U.S. 415, 418-19 (1996).

78. *Id.* at 419.

79. *Id.* at 420.

80. *Id.*

81. *Id.* at 421.

82. *Id.*

83. *Id.* at 433.

of a motion to set aside a jury verdict as excessive.<sup>84</sup> Based primarily on the conclusion that “[e]very circuit [court] has said that [appellate review is permitted] . . . if the size of the verdict seems to be too far out of line,”<sup>85</sup> the majority opinion concludes that “appellate review for abuse of discretion is reconcilable with the Seventh Amendment as a control necessary and proper to the fair administration of justice . . . .”<sup>86</sup> But the Supreme Court did not allow the court of appeals to exercise the same discretion as the trial court might exercise in ruling on a motion for new trial.<sup>87</sup> Instead, the Supreme Court held that the Seventh Amendment restricted but did not prohibit courts of appeals from ruling on whether the trial court abused its discretion in evaluating the sufficiency of the evidence because the verdict is excessive.<sup>88</sup>

In dissent, Justices Scalia and Rehnquist would have held that the Seventh Amendment’s Reexamination Clause precludes review of a district court’s refusal to set aside a verdict as contrary to the weight of the evidence and prohibits appellate courts from reexamining the district court’s decision.<sup>89</sup> As Justice Scalia’s dissenting opinion stated:

I am persuaded that our prior cases were correct that, at common law, “reexamination” of the facts found by a jury could be undertaken only by the trial court, and that appellate review was restricted to writ of error which could challenge the judgment only upon matters of law. . . . Cases of this Court reaching back into the early 19th century establish that the Constitution forbids federal appellate courts to “reexamine” a fact found by the jury at trial . . . .<sup>90</sup>

As explained by Professor Cassandra B. Robertson:

Scholars have been as divided as the [Supreme] Court itself over the Court’s decision in *Gasperini*. Some have agreed with *Gasperini*’s conclusion that appellate courts should be allowed to review a trial court’s ruling on the weight of the evidence, based either on historical practice or on an argument that the Seventh Amendment should be given a “dynamic interpretation.”<sup>91</sup>

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84. *Id.* at 433–36.

85. *Id.* at 435 (quoting WRIGHT ET AL., *supra* note 75, § 2820, at 209).

86. *Id.*

87. *Id.* at 438.

88. *Id.*

89. *See id.* at 458.

90. *Id.* at 457–58.

91. Cassandra B. Robertson, *Judging Jury Verdicts*, 83 TUL. L. REV. 157, 192–93 (2008) (citing Woolley, *supra* note 76, at 510–16). Professor Laurence Tribe has also explained that: “It is difficult to avoid the conclusion that the *Gasperini* Court was led into error—that it seriously misunderstood the Re-examination Clause and essentially ignored the Seventh Amendment’s unique focus on the common law history as of the time of the amendment’s adoption.” 1 LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW, § 3–32, at 629 (3d ed. 2000).

## IX. MODERN EVOLUTION OF JURY TRIAL RIGHTS

Until recently, the American experience with jury trial practice has been very positive throughout history. Despite some hostility to the adoption of the constitutional right to jury trial in civil cases by the Federalists in 1787, the Seventh Amendment to the Constitution was approved by Congress in 1789 and ratified by the states in 1791.

As adopted, the Seventh Amendment contains a Reexamination Clause which states that judicial reexamination of jury verdicts is prohibited “in any Court of the United States, than according to the rules of the common law.”<sup>92</sup>

Continuing controversy about the meaning of the constitutional right of trial by jury in civil cases based on the Seventh Amendment and similar state law standards has evolved so that judicial review of verdicts and judgments now rests on evolving evidentiary sufficiency standards applied in federal courts and on similar standards followed in state courts. Accordingly, the review standards concerning the sufficiency of the evidence are now the primary safeguards protecting the public’s right to the fair adjudication of disputes. While these standards are complex and subject to debate, reinterpretation, and change, they protect against usurpation by judges and reviewing courts of the public’s right to conventional trials. Despite the potential vulnerability of jury and bench trial findings under current standards of review, these standards of review are compatible with the preservation of verdicts and judgments based on the determination of mixed questions of law and fact by juries and judges.<sup>93</sup>

Other factors have more directly affected the decline in the use of conventional trials to resolve disputes, including the multitude of substantive and procedural changes in the types of disputes that are resolved in court; the increasing complexity of the substantive law; the availability of alternative methods of dispute resolution; and substantive and procedural changes in the processes of pretrial, trial, and appellate practice that have developed over the last 80 to 100 years.<sup>94</sup>

## X. TRANSFORMATION OF TRIAL PRACTICE INTO LITIGATION

In general terms, the mechanisms for resolving civil disputes and the procedures available and necessary for the resolution of disputes in court experienced enormous changes during the twentieth century. As a result of the adoption of the Federal Rules of Civil Procedure in 1938 and comparable state laws thereafter, a new pretrial practice phase of adjudication was adopted in state and federal courts in the United States. One

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92. U.S. CONST. amend. VII.

93. William V. Dorsaneo, III, *Reexamining the Right to Trial by Jury*, 54 SMU L. REV. 1695, 1698–99 (2001). *See supra* note 43.

94. *See* DENNIS HALE, *THE JURY IN AMERICA: TRIUMPH AND DECLINE* 335–50 (2016); *see also* John H. Langbein, *The Disappearance of Civil Trial in the United States*, 122 YALE L.J. 522, 569–72 (2012).

major consequence of this reform has been the reduction in both the attractiveness and the need for civil trials, and particularly jury trials, to resolve or to facilitate the resolution of civil disputes in court. Another consequence that was probably not foreseen by the reformers is the increased time and expense involved in the operation of an increasingly complex pretrial phase that may facilitate a reasonable settlement or that may instead increase the cost of litigation so that settlement becomes an undesired necessity.

Before the adoption of the Federal Rules of Civil Procedure, pretrial practice was extremely limited. In particular, pretrial discovery was limited, both in scope and the procedures available under procedural rules and statutes.<sup>95</sup> In addition, there was no pretrial conference rule, no comprehensive pretrial practice procedures other than pleading practice, and no summary judgment rule. More generally, pretrial practice was controlled by rules governing the parties' pleadings.

By contrast, modern litigation became the practice of pretrial discovery and motion practice. By the end of the Twentieth Century, pretrial discovery practice, summary judgment motion practice and other forms of alternative dispute resolution began to replace the resolution of many disputes by trials. As a result, conventional trials and particularly jury trials occurred and continue to occur less and less frequently.<sup>96</sup>

Civil jury trial practice has also been adversely affected in recent decades by myriad forms of legislation, regulation, and rule-making, generally described as tort reform. In addition, the widespread use and enforcement of arbitration clauses, forum selection clauses, and contractual waivers of even constitutional jury trial rights have contributed to the demise of jury trials. Finally, successful attacks have been made on civil juries and jury trial practice by politicians, insurance, and business interests in the public media. As a result, the use of juries in civil cases has been diminished greatly and is unlikely to regain prominence in future cases.

## XI. CONCLUSION

As a result of all of these factors, the prognosis for the rejuvenation of civil jury trials in ordinary cases is poor.<sup>97</sup> Jury trials will probably continue to occur in a small percentage of civil cases that are tried in whole or in part by trial specialists. Similarly, evidentiary hearings and separate trials will continue to be conducted in particular types of litigation. But despite the adoption and proposals for adoption of new procedures designed to facilitate the use of jury and bench trials to resolve disputes, by

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95. See Julius F. Franki, *Discovery*, 13 TEX. B.J. 447, 447-48, 475-76 (1950).

96. See Nathan L. Hecht, *The Vanishing Civil Jury Trial: Trends in Texas Courts and an Uncertain Future*, 47 S. TEX. L. REV. 163, 172-81 (2005).

97. See Jennifer W. Elrod, *Is the Jury Still Out?: A Case for the Continued Viability of the American Jury*, 44 TEX. TECH L. REV. 303, 323 (2012) ("If you dream of representing a client in court before a jury, that dream may be vanishing along with the jury trial. . . . [C]ivil jury trials are becoming the rare exception rather than the rule.").



making trials shorter, less expensive, and more efficient,<sup>98</sup> even if substantial improvements are made in the trial process, there is no likelihood that civil trial practice will again become the central or even a routine part of a general practitioner's practice activities. This means that jury trial practice in America is likely to follow the English pattern for many reasons, including especially the probable choice of the public and the legal profession not to use conventional trials to resolve most civil disputes.

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98. See Stephen D. Susman & Thomas M. Melsheimer, *Trial by Agreement: How Trial Lawyers Hold the Key to Improving Jury Trials in Civil Cases*, 32 REV. LITIG. 431, 441–66 (2013).