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SEVENTH AMENDMENT

CIVIL TRIALS

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CIVIL TRIALS

SEVENTH AMENDMENT

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.

TRIAL BY JURY IN CIVIL CASES

The Right and the Characteristics of the Civil Jury

History.—On September 12, 1787, as the Convention was in its final stages, Mr. Williamson of North Carolina "observed to the House that no provision was yet made for juries in Civil cases and suggested the necessity of it." The comment elicited some support and the further observation that because of the diversity of practice in civil trials in the States it would be impossible to draft a suitable provision.[1] When on September 15 it was moved that a clause be inserted in Article III, § 2, to guarantee that "a trial by jury shall be preserved as usual in civil cases," this objection seems to have been the only one urged in opposition and the motion was defeated.[2] The omission, however, was cited by many opponents of ratification and "was pressed with an urgency and zeal . . . well-nigh preventing its ratification."[3] A guarantee of right to jury in civil cases was one of the amendments urged on Congress by the ratifying conventions[4] and it was included from the first among Madison's proposals to the House.[5] It does not appear that the text

[1] 2 M. FARRAND, RECORDS OF THE FEDERAL CONVENTION OF 1787, at 587 (rev. ed. 1937).

[2] Id. at 628.

[3] J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 1757 (1833). "[I]t is a most important and valuable amendment; and places upon the high ground of constitutional right the inestimable privilege of a trial by jury in civil cases, a privilege scarcely inferior to that in criminal cases, which is conceded by all to be essential to political and civil liberty." Id. at 1762.

[4] J. ELLIOTT, THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 326 (2d ed. 1836) (New Hampshire); 2 id. at 399–414 (New York); 3 id. at 658 (Virginia).

[5] 1 ANNALS OF CONGRESS 436 (1789). "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."

of the proposed amendment or its meaning was debated during its passage.[6]

Composition and Functions of Civil Jury.—Traditionally, the Supreme Court has treated the Seventh Amendment as preserving the right of trial by jury in civil cases as it "existed under the English common law when the amendment was adopted."[7] The right was to "a trial by a jury of twelve men, in the presence and under the superintendence of a judge empowered to instruct them on the law and to advise them on the facts and (except in acquittal of a criminal charge) to set aside their verdict if in his opinion it is against the law or the evidence."[8] Decision of the jury must be by unanimous verdict.[9] In *Colgrove v. Battin*,[10] however, the Court by a five-to-four vote held that rules adopted in a federal district court authorizing civil juries composed of six persons were permissible under the Seventh Amendment and congressional enactments. By the reference in the Amendment to the "common law," the Court thought, "the Framers of the Seventh Amendment were concerned with preserving the *right* of trial by jury in civil cases where it existed at common law, rather than the various incidents of trial by jury."[11]

The Amendment has for its primary purpose the preservation of "the common law distinction between the province of the court and that of the jury, whereby, in the absence of express or implied consent to the contrary, issues of law are resolved by the court and issues of fact are to be determined by the jury under appropriate

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[6] It is simply noted in 1 ANNALS OF CONGRESS 760 (1789), that on August 18 the House "considered and adopted" the committee version: "In suits at common law, the right of trial by jury shall be preserved." On September 7, the SENATE JOURNAL states that this provision was adopted after insertion of "where the consideration exceeds twenty dollars." 2 B. SCHWARTZ, THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 1150 (1971).

[7] Baltimore & Carolina Line v. Redman, 295 U.S. 654, 657 (1913); Parsons v. Bedford, 28 U.S. (3 Pet.) 433, 446–48 (1830).

[8] Capital Traction Co. v. Hof, 174 U.S. 1, 13 (1899).

[9] Maxwell v. Dow, 176 U.S. 581 (1900); American Publishing Co. v. Fisher, 166 U.S. 464 (1897); Springville v. Thomas, 166 U.S. 707 (1897).

[10] 413 U.S. 149 (1973). Justices Marshall and Stewart dissented on constitutional and statutory grounds, id. at 166, while Justices Douglas and Powell relied only on statutory grounds without reaching the constitutional issue. Id. at 165, 188.

[11] Id. at 155–56. The Court did not consider what number less than six, if any, would fail to satisfy the Amendment's requirements. "What is required for a 'jury' is a number large enough to facilitate group deliberation combined with a likelihood of obtaining a representative cross section of the community. . . . It is undoubtedly true that at some point the number becomes too small to accomplish these goals . . ." Id. at 160 n.16. Application of similar reasoning has led the Court to uphold elimination of the unanimity as well as the 12-person requirement for criminal trials. *See* Williams v. Florida, 399 U.S. 78 (1970) (jury size); Apodaca v. Oregon, 406 U.S. 404 (1972) (unanimity); and Sixth Amendment discussion supra "The Attributes of the Jury."

instructions by the court."[12] But it "does not exact the retention of old forms of procedure" nor does it "prohibit the introduction of new methods of ascertaining what facts are in issue" or new rules of evidence.[13] Those matters which were tried by a jury in England in 1791 are to be so tried today and those matters which, as in equity, were tried by the judge in England in 1791 are to be so tried today,[14] and when new rights and remedies are created "the right of action should be analogized to its historical counterpart, at law or in equity, for the purpose of determining whether there is a right of jury trial," unless Congress has expressly prescribed the mode of trial.[15]

Courts in Which the Guarantee Applies.—The Amendment governs only courts which sit under the authority of the United States,[16] including courts in the territories[17] and the District of Columbia,[18] and does not apply generally to state courts.[19] But when a state court is enforcing a federally created right, of which the right to trial by jury is a substantial part, the States may not eliminate trial by jury as to one or more elements.[20] Ordinarily, a federal court enforcing a state-created right will follow its own rules with regard to the allocation of functions between judge and jury, a rule the Court based on the "interests" of the federal court system, eschewing reliance on the Seventh Amendment but noting its influence.[21] Where the "interests" of the state and federal sys-

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[12] Baltimore & Carolina Line v. Redman, 295 U.S. 654, 657 (1935); Walker v. New Mexico & So. Pac. R.R., 165 U.S. 593, 596 (1897); Gasoline Products Co. v. Champlin Ref. Co., 283 U.S. 494, 497–99 (1931); Dimick v. Schiedt, 293 U.S. 474, 476, 485–86 (1935).

[13] Gasoline Products Co. v. Champlin Ref. Co., 283 U.S. 494, 498 (1931); Ex parte Peterson, 253 U.S. 300, 309 (1920).

[14] Parsons v. Bedford, 28 U.S. (3 Pet.) 433, 446–47 (1830); Slocum v. New York Life Ins. Co., 228 U.S. 364, 377–78 (1913); Baltimore & Carolina Line v. Redman, 295 U.S. 654, 657 (1935); Dimick v. Schiedt, 293 U.S. 474, 476 (1935). *But see* Ross v. Bernhard, 396 U.S. 531 (1970), which may foreshadow a new analysis.

[15] Luria v. United States, 231 U.S. 9, 27–28 (1913).

[16] Pearson v. Yewdall, 95 U.S. 294, 296 (1877); Edwards v. Elliott, 88 U.S. (21 Wall.) 532, 557 (1874); The Justices v. Murray, 76 U.S. (9 Wall.) 274, 277 (1870); Walker v. Sauvinet, 92 U.S. 90 (1876); St. Louis & K.C. Land Co. v. Kansas City, 241 U.S. 419 (1916).

[17] Webster v. Reid, 52 U.S. (11 How.) 437, 460 (1851); Kennon v. Gilmer, 131 U.S. 22, 28 (1889).

[18] Capital Traction Co. v. Hof, 174 U.S. 1, 5 (1899).

[19] Minneapolis & St. Louis R.R. v. Bombolis, 241 U.S. 211 (1916). *See also* Melancon v. McKeithen, 345 F. Supp. 105 (E.D.La.) (three-judge court), *aff'd. per curiam*, 409 U.S. 943 (1972); Alexander v. Virginia, 413 U.S. 836 (1973).

[20] Dice v. Akron, C. & Y. R.R., 342 U.S. 359 (1952). Four dissenters contended that the ruling was contrary to the unanimous decision in *Bombolis*.

[21] Byrd v. Blue Ridge Rural Elec. Coop., 356 U.S. 525 (1958) (citing Herron v. Southern Pacific Co., 283 U.S. 91 (1931)).

tems can be reconciled, however, a court should endeavor to implement the rules of the state courts.[22]

Waiver of the Right.—Parties may enter into a stipulation waiving a jury and submitting the case to the court upon an agreed statement of facts, even without any legislative provision for waiver.[23] Prior to adoption of the Federal Rules, Congress had, "by statute, provided for the trial of issues of fact in civil cases by the court without the intervention of a jury, only when the parties waive their right to a jury by a stipulation in writing."[24] Under the Federal Rules of Civil Procedure, any party may make a timely demand for a trial by jury of any issue triable of right by a jury by serving upon the other parties a demand therefor in writing, and failure so to serve a demand constitutes a waiver of the right.[25] However, a waiver is not to be implied from a request for a directed verdict.[26]

Application of the Amendment

Cases "at Common Law".—The coverage of the Amendment is "limited to rights and remedies peculiarly legal in their nature, and such as it was proper to assert in courts of law and by the appropriate modes and proceedings of courts of law."[27] The term "common law" was used in contradistinction to suits in which equitable rights alone were recognized at the time of the framing of the Amendment and equitable remedies were administered.[28] Illus-

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[22] Gasperini v. Center for Humanities, Inc., 518 U.S. 415 (1996). In *Gasperini*, the Court examined whether New York state law, which required that state trial courts and courts of appeals review jury awards to determine if they "deviate materially from reasonable compensation," should be applied by federal courts exercising diversity jurisdiction. The Court, in what has been characterized as a "state-friendly" decision, *Leading Cases*, 110 HARV. L. REV. 266 (1996), found that absent inconsistent federal interests, the state standard of review should be applied by the federal courts. The Court held that a district court could apply such a standard consistent with Seventh Amendment precepts, but that the court of appeals could only review an award under an "abuse of discretion" standard. 518 U.S. at 434–35.

[23] Henderson's Distilled Spirits, 81 U.S. (14 Wall.) 44, 53 (1872); Rogers v. United States, 141 U.S. 548, 554 (1891); Parsons v. Armor, 28 U.S. (3 Pet.) 413 (1830); Campbell v. Boyreau, 62 U.S. (21 How.) 223 (1859).

[24] Baylis v. Travellers' Ins. Co., 113 U.S. 316, 321 (1885). The provision did not preclude other kinds of waivers, Duignan v. United States, 274 U.S. 195, 198 (1927), though every reasonable presumption was indulged against a waiver. Hodges v. Easton, 106 U.S. 408, 412 (1883).

[25] FED. R. CIV. P. 38.

[26] Aetna Life Ins. Co. v. Kennedy, 301 U.S. 389 (1937); Fed. R. Civ. P. 50(a).

[27] Shields v. Thomas, 59 U.S. (18 How.) 253, 262 (1856).

[28] Parsons v. Bedford, 28 U.S. (3 Pet.) 443, 447 (1930); Barton v. Barbour, 104 U.S. 126, 133 (1881). Formerly, it did not apply to cases where recovery of money damages was incidental to equitable relief even though damages might have been recovered in an action at law. Clark v. Wooster, 119 U.S. 322, 325 (1886); Pease

trative of the Court's course of decision on this subject are two unanimous decisions holding that civil juries were required, one in a suit by a landlord to recover possession of real property from a tenant allegedly behind on rent, the other in a suit for damages for alleged racial discrimination in the rental of housing in violation of federal law. In the former case, the Court reasoned that its Seventh Amendment precedents "require[ed] trial by jury in actions unheard of at common law, provided that the action involves rights and remedies of the sort traditionally enforced in an action at law, rather than in an action at equity or admiralty."[29] The statutory cause of action, the Court found, had several counterparts in the common law, all of which involved a right to trial by jury. In the latter case, the plaintiff had argued that the Amendment was inapplicable to new causes of action created by congressional action, but the Court disagreed. "The Seventh Amendment does apply to actions enforcing statutory rights, and requires a jury trial upon demand, if the statute creates legal rights and remedies, enforceable in an action for damages in the ordinary courts of law."[30]

Omission of provision for a jury has been upheld in a number of other cases on the ground that the suit in question was not a suit at common law within the meaning of the Amendment, or that the issues raised were not peculiarly legal in their nature.[31] Where

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v. Rathbun-Jones Eng. Co., 243 U.S. 273, 279 (1917). *But see* Dairy Queen v. Wood, 369 U.S. 469 (1962) (legal claims must be tried before equitable ones).

[29] Pernell v. Southall Realty, 416 U.S. 363 (1974).

[30] Curtis v. Loether, 415 U.S. 189, 194 (1974). "A damage action under the statute sounds basically in tort—the statute merely defines a new legal duty and authorizes the court to compensate a plaintiff for the injury caused by the defendants' wrongful breach. . . . [T]his cause of action is analogous to a number of tort actions recognized at common law." Id. at 195. *See also* Chauffeurs, Teamsters and Helpers Local 391 v. Terry, 494 U.S. 558 (1990) (suit against union for back pay for breach of duty of fair representation is a suit for compensatory damages, hence plaintiff is entitled to a jury trial); Wooddell v. International Bhd. of Electrical Workers Local 71, 502 U.S. 93 (1991) (similar suit against union for money damages entitles union member to jury trial; a claim for injunctive relief was incidental to the damages claim). Feltner v. Columbia Pictures Television, 523 U.S. 340 (1998) (jury trial required for copyright action with close analogue at common law, even though the relief sought is not actual damages but statutory damages based on what is "just)."

[31] Among such actions or issues were, *e.g.*, (1) enforcement of claims against the United States, McElrath v. United States, 102 U.S. 426, 440 (1880); *see also* Galloway v. United States, 319 U.S. 372, 388 (1943); (2) suit under a territorial statute authorizing a special nonjury tribunal to hear claims against a municipality having no legal obligation but based on moral obligation only, Guthrie Nat'l Bank v. Guthrie, 173 U.S. 528, 534 (1899); *see also* United States v. Realty Co., 163 U.S. 427, 439 (1896); New Orleans v. Clark, 95 U.S. 644, 653 (1877); (3) cancellation of a naturalization certificate for fraud, Luria v. United States, 231 U.S. 9, 27 (1913); (4) reversal of an order to deport an alien, Gee Wah Lee v. United States, 25 F.2d 107 (5th Cir. 1928), cert. denied, 277 U.S. 608 (1928); (5) damages for patent infringement, Filer & Stowell Co. v. Diamond Iron Works, 270 F. 489 (2d Cir. 1921), cert. denied, 256 U.S 691 (1921); (6) reversal of an award under the Longshoremen's and Harbor Workers' Compensation Act, Crowell v. Benson, 285 U.S. 22, 45 (1932); (7)

there is no direct historical antecedent dating to the adoption of the amendment, the court may also consider whether existing precedent and the sound administration of justice favor resolution by judges or juries.[32]

The amendment does not apply to cases in admiralty and maritime jurisdiction, in which the trial is by a court without a jury,[33] nor does it reach statutory proceedings unknown to the common law, such as an application to a court of equity to enforce an order of an administrative body.[34] Thus, when Congress committed to administrative determination the finding of a violation of the Occupational Safety and Health Act with a discretion to fix a fine for a violation, the charged party being able to obtain judicial review of the administrative proceeding in a federal court of appeal and the fine being collectible in a suit in federal court, the argument that the absence of a jury trial in the process for a charged party violated the Seventh Amendment was unanimously rejected. "At least in cases in which 'public rights' are being litigated—e.g., cases in which the Government sues in its sovereign capacity to enforce public rights created by statutes within the power of Congress to enact—the Seventh Amendment does not prohibit Congress from assigning the factfinding function and initial adjudication to an administrative forum with which the jury would be incompatible."[35]

On the other hand, if Congress assigns such cases to Article III courts, a jury may be required. In *Tull v. United States*,[36] the Court ruled that the Amendment requires trial by jury in civil actions to determine liability for civil penalties under the Clean Water Act, but not to assess the amount of penalty. The penal nature of the Clean Water Act's civil penalty remedy distinguishes it from restitution-based remedies available in equity courts, and

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reversal of a decision of customs appraisers on the value of imports, Auffmordt v. Hedden, 137 U.S. 310, 329 (1890); (8) a summary disposition by referee in bankruptcy of issues regarding voidable preferences as asserted and proved by the trustee, Katchen v. Landy, 382 U.S. 323 (1966); and (9) a determination by a judge in calculating just compensation in a federal eminent domain proceeding of the issue as to whether the condemned lands were originally within the scope of the government's project or were adjacent lands later added to the plan, United States v. Reynolds, 397 U.S. 14 (1970).

[32] Markman v. Westview Instruments, Inc., 517 U.S. 370 (1996) (interpretation and construction of terms underlying patent claims may be reserved entirely for the court).

[33] Parsons v. Bedford, 28 U.S. (3 Pet.) 443 (1830); Waring v. Clarke, 46 U.S. (5 How.) 441, 460 (1847); Romero v. International Terminal Operating Co., 358 U.S. 354 (1959). *But see* Fitzgerald v. United States Lines, 374 U.S. 16 (1963).

[34] NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 48 (1937). *See also* ICC v. Brimson, 154 U.S. 447, 488 (1894); Yakus v. United States, 321 U.S. 414, 447 (1944).

[35] Atlas Roofing Co. v. OSHRC, 430 U.S. 442, 450 (1977).

[36] 481 U.S. 412 (1987).

therefore makes it a remedy of the type that could be imposed only by courts of law.[37] On the other hand, a jury need not invariably determine the remedy in a trial in which it must determine liability. Because the Court viewed assessment of the amount of penalty as involving neither the "substance" nor a "fundamental element" of a common-law right to trial by jury, it held permissible the Act's assignment of that task to the trial judge.

More recently still, the Court relied on a broadened concept of "public rights" to define the limits of congressional power to assign causes of action to tribunals in which jury trials are unavailable. In *Granfinanciera, S.A. v. Nordberg*,[38] the Court declared that Congress "lacks the power to strip parties contesting matters of private right of their constitutional right to a trial by jury." The Seventh Amendment test, the Court indicated, is the same as the Article III test for whether Congress may assign adjudication of a claim to a non-Article III tribunal.[39] As a general matter, "public rights" involve "'the relationship between the Government and persons subject to its authority,'" while "private rights" relate to "'the liability of one individual to another.'"[40] While finding room for "some debate," the Court determined that a bankruptcy trustee's right to recover for a fraudulent conveyance "is more accurately characterized as a private rather than a public right," at least

[37] The statute itself specified only a maximum amount for the penalty; the Court derived its "punitive" characterization from indications in legislative history that Congress desired consideration of the need for retribution and deterrence as well as the need for restitution.

[38] 492 U.S. 33, 51–52 (1989).

[39] "[I]f a statutory cause of action . . . is not a 'public right' for Article III purposes, then Congress may not assign its adjudication to a specialized non-Article III court lacking 'the essential attributes of the judicial power.' And if the action must be tried under the auspices of an Article III court, then the Seventh Amendment affords the parties the right to a jury trial whenever the cause of action is legal in nature. Conversely, if Congress may assign the adjudication of a statutory cause of action to a non-Article III tribunal, then the Seventh Amendment poses no independent bar to the adjudication of that action by a nonjury factfinder." Id. at 53–54 (citation omitted).

[40] Id. at 51 n.8 (quoting Crowell v. Benson, 285 U.S. 22, 50, 51 (1932)). The Court qualified certain statements in *Atlas Roofing* and in the process refined its definition of "public rights." There are some "public rights" cases, the Court explained, in which "the Federal Government is not a party in its sovereign capacity," but which involve "statutory rights that are integral parts of a public regulatory scheme." It is in cases of this nature that Congress may "dispense with juries as factfinders through its choice of an adjudicative forum." This does not mean, however, that Congress may assign "at least the initial factfinding in *all* cases involving controversies entirely between private parties to administrative tribunals or other tribunals not involving juries, so long as they are established as adjuncts to Article III courts." 492 U.S. at 55 n.10 (emphasis added).

when the defendant had not submitted a claim against the bankruptcy estate.[41]

The Continuing Law-Equity Distinction.—The use of the term "common law" in the Amendment as indicating those cases in which the right to jury trial was to be preserved reflected, of course, the division of the English and United States legal systems into separate law and equity jurisdictions, in which actions cognizable in courts of law generally were triable to a jury while in equity there was no right to a jury. In the federal court system there were unitary courts having jurisdiction in both law and equity, but distinct law and equity procedures, including the use or nonuse of the jury. Adoption of the Federal Rules of Civil Procedure in 1938 merged law and equity into a single civil jurisdiction and established uniform rules of procedure. Legal and equitable claims which previously had to be brought as separate causes of action on different "sides" of the court could now be joined in a single action, and in some instances, such as compulsory counterclaims, had to be joined in one action.[42] But the traditional distinction between law and equity for purposes of determining when there was a constitutional right to trial by jury remained and led to some difficulty.[43]

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[41] Id. at 55. On the other hand, a creditor who does submit a claim against the bankruptcy estate subjects himself to the bankruptcy court's equitable power, and is not entitled to a jury trial when subsequently sued by the bankruptcy trustee to recover preferential monetary transfers. Langenkamp v. Culp, 498 U.S. 42 (1990).

[42] 5 J. MOORE, FEDERAL PRACTICE §§ 38.01–38.05 (2d ed. 1971).

[43] Under the old equity rules it had been held that the absolute right to a trial of the facts by a jury could not be impaired by any blending with a claim, properly cognizable at law, of a demand for equitable relief in aid of the legal action or during its pendency. Hipp v. Babin, 60 U.S. (19 How.) 271, 278 (1857). The Seventh Amendment was interpreted to mean that equitable and legal issues could not be tried in the same suit, so that such aid in the federal courts had to be sought in separate proceedings. Scott v. Neely, 140 U.S. 106, 109 (1891); Bennett v. Butterworth, 52 U.S. (11 How.) 669 (1850); Lewis v. Cocks, 90 U.S. (23 Wall.) 466, 470 (1874); Killian v. Ebbinghaus, 110 U.S. 568, 573 (1884); Buzard v. Houston, 119 U.S. 347, 351 (1886). Where an action at law evoked an equitable counterclaim the trial judge would order the legal issues to be separately tried after the disposition of the equity issues. In this procedure, however, *res judicata* and collateral estoppel could operate so as to curtail the litigant's right to a jury finding on factual issues common to both claims. But priority of scheduling was considered to be a matter of discretion. Federal statutes prohibiting courts of the United States from sustaining suits in equity where the remedy was complete at law served to guard the right of trial by jury and were liberally construed. Schoenthal v. Irving Trust Co., 287 U.S. 92, 94 (1932).

Nor was the distinction between law and equity to be obliterated by state legislation. Thompson v. Railroad Companies, 73 U.S. (6 Wall.) 134 (1868). So, where state law, in advance of judgment, treated the whole proceeding upon a simple contract, including determination of validity and of amount due, as an equitable proceeding, it brought the case within the federal equity jurisdiction upon removal. Ascertainment of plaintiff's demand being properly by action at law, however, the fact that the equity court had power to summon a jury on occasion did not afford an

This difficulty has been resolved by stressing the fundamental nature of the jury trial right and protecting it against diminution through resort to equitable principles. In *Beacon Theatres v. Westover*,[44] the Court held that a district court erred in trying all issues itself in an action in which the plaintiff sought a declaratory judgment and an injunction barring the defendant from instituting an antitrust action against it, and the defendant had filed a counterclaim alleging violation of the antitrust laws and asking for treble damages. It did not matter, the Court ruled, that the equitable claims had been filed first and the law counterclaims involved allegations common to the equitable claims. Subsequent jury trial of these issues would probably be precluded by collateral estoppel, hence "only under the most imperative circumstances which in view of the flexible procedures of the Federal Rules we cannot now anticipate, can the right to a jury trial of legal issues be lost through prior determination of equitable claims."[45] Then in *Dairy Queen v. Wood*,[46] in which the plaintiff sought several types of relief, including an injunction and an accounting for money damages, the Court held that, even though the claim for legal relief was incidental to the equitable relief sought, the Seventh Amendment required that the issues pertaining to that legal relief be tried before

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equivalent of the right of trial by jury secured by the Seventh Amendment. Whitehead v. Shattuck, 138 U.S. 146 (1891); Buzard v. Houston, 119 U.S. 347 (1886); Greeley v. Lowe, 155 U.S. 58, 75 (1894). But where state law gave an equitable remedy, such as to quiet title to land, the federal courts enforced it, if it did not obstruct the rights of the parties as to trial by jury. Clark v. Smith, 38 U.S. (13 Pet.) 195 (1839); Holland v. Challen, 110 U.S. 15 (1884); Reynolds v. Crawfordsville Bank, 112 U.S. 405 (1884); Chapman v. Brewer, 114 U.S. 158 (1885); Cummings v. National Bank, 101 U.S. 153, 157 (1879); United States v. Landram, 118 U.S. 81 (1886); More v. Steinbach, 127 U.S. 70 (1888). *Cf.* Ex parte Simons, 247 U.S. 321 (1918).

By the inclusion in the Law and Equity Act of 1915 of § 274(b) of the Judicial Code, 38 Stat. 956, the transfer of cases to the other side of the court was made possible. The new procedure permitted legal questions arising in an equity action to be determined therein without sending the case to the law side. This section also permitted equitable defenses to be interposed in an action at law. The same order was preserved as under the system of separate courts. The equitable issues were disposed of first, and if a legal issue remained, it was triable by a jury. Enelow v. New York Life Ins. Co., 293 U.S. 379 (1935). *See also* Liberty Oil Co. v. Condon Bank, 260 U.S. 235 (1922). There was no provision for legal counterclaims in an equitable action, for the reason that Equity Rule 30, requiring the answer to a bill in equity to state any counterclaim arising out of the same transaction, was not intended to change the line between law and equity and was construed as referring to equitable counterclaims only. American Mills Co. v. American Surety Co., 260 U.S. 360, 364 (1922); Stamey v. United States, 37 F.2d 188 (W.D. Wash. 1929). Equitable jurisdiction existing at the time of the filing of the bill was not disturbed by the subsequent availability of legal remedies, and the scheduling was discretionary. American Life Ins. Co. v. Stewart, 300 U.S. 203 (1937).

[44] 359 U.S. 500 (1959).

[45] Id. at 510–11.

[46] 369 U.S. 469 (1962).

a jury, because the primary rights being adjudicated were legal in character. Thus, the rule that emerged was that legal claims must be tried before equitable ones and before a jury if the litigant so wished.[47]

In *Ross v. Bernhard*,[48] the Court further held that the right to a jury trial depends on the nature of the issue to be tried rather than the procedural framework in which it is raised. The case involved a stockholder derivative action,[49] which has always been considered to be a suit in equity. The Court agreed that the action was equitable but asserted that it involved two separable claims. The first, the stockholder's standing to sue for a corporation, is an equitable issue; the second, the corporation's claim asserted by the stockholder, may be either equitable or legal. Because the 1938 merger of law and equity in the federal courts eliminated any procedural obstacles to transferring jurisdiction to the law side once the equitable issue of standing was decided, the Court continued, if the corporation's claim being asserted by the stockholder was legal in nature, it should be heard on the law side and before a jury.[50] Whether this analysis will be followed in other areas so that the right to a jury trial extends to all legal issues in actions formerly within equity's concurrent jurisdiction is a question now open.[51]

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[47] If legal and equitable claims are joined, and the court erroneously dismisses the legal claims and decides common issues in the equitable action, the plaintiff cannot be collaterally estopped from relitigating those common issues in a jury trial. Lytle v. Household Manufacturing, Inc., 494 U.S. 545 (1990).

[48] 396 U.S. 531 (1970).

[49] The stockholders' derivative action is a creation of equity made necessary by the traditional concept of "the corporate entity" or the "concept of separate personality." That is, the corporation is an entity distinct and separate from its shareholders. Thus, while shareholders were relieved from unlimited liability for corporate liabilities, the complementary result was that harm to the corporation did not confer any right of action upon a shareholder to sue to right that harm. But if the harm were caused by the abuse of those who managed and controlled the corporation, the corporation naturally would not proceed against them and the common law courts would not allow the shareholders to bring an action running to the "separate personality" of the corporation; equity thus permitted a derivative action in which the shareholder is permitted to set in motion the adjudication of a cause of action belonging to the corporation. Prunty, *The Shareholders' Derivative Suit: Notes on Its Derivation*, 32 N.Y.U. L. REV. 980 (1957).

[50] Justices Stewart and Harlan and Chief Justice Burger dissented, arguing that the Seventh Amendment did not expand the right to a jury trial, that the Rules simply preserved the right as it had existed, and that it was error to think that the two could somehow "magically interact" to enlarge the right in a way that neither did alone. Ross v. Bernhard, 396 U.S. 531, 543 (1970).

[51] Among the possibilities in which a legal right was enforceable in equity in the absence of an adequate remedy at law are suits to compel specific performance of a contract, suits for cancellation of a contract, and suits to enjoin tortious action. On Ross' implications, *see* J. MOORE, FEDERAL PRACTICE §§ 38.11[8.-8], 38.11[9] (2d ed. 1971).

Procedures Limiting Jury's Role.—As was noted above, the primary purpose of the Amendment was to preserve the historic line separating the province of the jury from that of the judge, without at the same time preventing procedural improvement which did not transgress this line. Elucidating this formula, the Court has achieved the following results: it is constitutional for a federal judge, in the course of trial, to express his opinion upon the facts, provided all questions of fact are ultimately submitted to the jury,[52] to call the jury's attention to parts of the evidence he deems of special importance,[53] being careful to distinguish between matters of law and matters of opinion in relation thereto,[54] to inform the jury when there is not sufficient evidence to justify a verdict, that such is the case,[55] to require a jury to answer specific interrogatories in addition to rendering a general verdict,[56] to direct the jury, after the plaintiff's case is all in, to return a verdict for the defendant on the ground of the insufficiency of the evidence,[57] to set aside a verdict which in his opinion is against the law or the evidence, and order a new trial,[58] to refuse defendant a new trial on the condition, accepted by plaintiff, that the latter remit a portion of the damages awarded him,[59] but not, on the other hand, to deny plaintiff a new trial on the converse condition, although defendant accepted it.[60] Nor can a Court of Appeals reverse the jury's finding on the issue of reasonableness of petitioner's conduct, in an indemnity action for damages respondent had paid petitioner's employee, on the ground that as a matter of law petitioner had not acted reasonably; "[u]nder the Seventh Amendment, that issue should have been left to the jury's determination."[61]

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[52] Vicksburg & Meridian R.R. v. Putnam, 118 U.S. 545, 553 (1886); United States v. Philadelphia & Reading R.R., 123 U.S. 113, 114 (1887).

[53] Vicksburg & Meridian R.R. v. Putnam, 118 U.S. 545 (1886) (citing Carver v. Jackson, 29 U.S. (4 Pet.) 1, 80 (1830); Magniac v. Thompson, 32 U.S. (7 Pet.) 348, 390 (1833); Mitchell v. Harmony, 54 U.S. (13 How.) 115, 131 (1852); Transportation Line v. Hope, 95 U.S. 297, 302 (1877)).

[54] Games v. Dunn, 39 U.S. (14 Pet.) 322, 327 (1840).

[55] Sparf and Hansen v. United States, 156 U.S. 51, 99–100 (1895); Pleasants v. Fant, 89 U.S. (22 Wall.) 116, 121 (1875); Randall v. Baltimore & Ohio R.R., 109 U.S. 478, 482 (1883); Meehan v. Valentine, 145 U.S. 611, 625 (1892); Coughran v. Bigelow, 164 U.S. 301 (1896).

[56] Walker v. New Mexico So. Pac. R.R., 165 U.S. 593, 598 (1897).

[57] Treat Mfg. Co. v. Standard Steel & Iron Co., 157 U.S. 674 (1895); Randall v. Baltimore & Ohio R.R., 109 U.S. 478, 482 (1883), and cases cited therein.

[58] Capital Traction Co. v. Hof, 174 U.S. 1, 13 (1889).

[59] Arkansas Cattle Co. v. Mann, 130 U.S. 69, 74 (1889).

[60] Dimick v. Schiedt, 293 U.S. 474, 476–78 (1935).

[61] International Terminal Operating Co. v. N. V. Nederl. Amerik Stoomv, Maats., 393 U.S. 74, 75 (1968). *But see* Neely v. Martin K. Eby Construction Co., 386 U.S. 317 (1967), where the Court held that the Seventh Amendment does not bar an appellate court from granting a judgment *n. o. v.* insofar as "there is no greater restriction on the province of the jury when an appellate court enters judg-

Directed Verdicts.—In 1913 the Court in *Slocum v. New York Life Ins. Co.*,[62] held that a federal appeals court lacked authority to order the entry of a judgment contrary to the verdict in a case in which the federal trial court should have directed a verdict for one party, but the jury had found for the other party contrary to the evidence; the only course open to either court was to order a new trial. While plainly in accordance with the common law as it stood in 1791, the five-to-four decision was subjected to a heavy fire of professional criticism based on convenience and urging recognition of capacity for growth in the common law.[63] *Slocum* was then impaired, if not completely undermined, by subsequent holdings.[64]

In the first of these cases, the Court held that a trial court had the right to enter a judgment for the plaintiff on the verdict of the jury after having reserved decision on a motion by the defendant for dismissal on the ground of insufficient evidence.[65] The Court distinguished *Slocum* while noting that its ruling qualified some of its assertions in *Slocum*.[66] In the second case[67] the Court sustained a United States district court in rejecting the defendant's motion for dismissal and in peremptorily directing a verdict for the plaintiff. The Supreme Court held that there was ample evidence to support the verdict and that the trial court, in following Arkansas procedure in the diversity action, had acted consistently with the Federal Conformity Act.[68] In the third case,[69] which involved

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ment *n. o. v.* than when a trial court does." Id. at 322. A federal appellate court may also review a district court's denial of a motion to set aside an award as excessive under an abuse of discretion standard. Gasperini v. Center for Humanities, Inc., 518 U.S. 415 (1996) (New York State law which requires a review of jury awards to determine if they "deviate materially from reasonable compensation" may be adopted by federal district, but not appellate, court exercising diversity jurisdiction).

[62] 228 U.S. 364 (1913).

[63] F. JAMES, CIVIL PROCEDURE 332–33 & n.8 (1965).

[64] *But see* Hetzel v. Prince William County, 523 U.S. 208 (1998) (when an appeals court affirms liability but orders the level of damages to be reconsidered, the plaintiff has a Seventh Amendment right either to accept the reduced award or to have a new trial).

[65] Baltimore & Carolina Line v. Redman, 295 U.S. 654 (1935).

[66] Id. at 661. The Court's opinions in both *Redman* and *Slocum* were authored by Justice Van Devanter.

[67] Lyon v. Mutual Benefit Ass'n, 305 U.S. 484 (1939).

[68] Ch. 255, § 5, 17 Stat. 197 (1872), now superseded by the Federal Rules of Civil Procedure.

[69] Galloway v. United States, 319 U.S. 372, 389 (1943), wherein the Court said "the practice has been approved explicitly in the promulgation of the Federal Rules of Civil Procedure," citing Berry v. United States, 312 U.S. 450 (1941). In the latter case the Court remarked that the new rule has given "district judges, under certain circumstances, . . . the right (but not the mandatory duty) to enter a judgment contrary to the jury's verdict without granting a new trial. But that rule has not taken away from juries and given to judges any part of the exclusive power of juries to weigh evidence and determine contested issues of facts—a jury being the constitutional tribunal provided for trying facts in courts of law." Id. at 452–53.

an action against the Government for benefits under a war risk insurance policy which had been allowed to lapse, the trial court directed a verdict for the Government on the ground of the insufficiency of the evidence, and was sustained in so doing by both the appeals court and the Supreme Court. Three Justices, speaking by Justice Black, dissented in an opinion in which it is asserted that "today's decision marks 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 of the Seventh Amendment."[70] That the Court should experience occasional difficulty in harmonizing the idea of preserving the historic common law covering the relations of judge and jury with the notion of a developing common law is not surprising.[71]

Jury Trial Under the Federal Employers' Liability Act.— One aspect of the problem of delineating the respective provinces of judge and jury divided the Justices for a lengthy period but now appears quiescent—cases arising under the Federal Employers' Liability Act. The argument was frequently couched by the majority in terms of protecting the function of the jury from usurpation by judges intent on subverting and limiting remedial legislation enacted by Congress,[72] and by the minority in terms of the costs to the Supreme Court in time and effort spent in evaluating the quantum of evidence necessary to create a jury question.[73]

Although the considerations present in the FELA cases were not inherently different from those in any civil case where the direction of a verdict or a decision of an issue by the court may raise *sub silentio* the issue whether the Seventh Amendment right to a

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[70] 319 U.S. 372, 397. The case, being a claim against the United States, need not have been tried by a jury except for the allowance of Congress.

[71] *See, e.g.*, Neely v. Martin K. Eby Construction Co., Inc., 386 U.S. 317 (1967), interpreting Rules 50(b), 50(c)(2) and 50(d) of the Federal Rules of Civil Procedure, as well as the Seventh Amendment.

[72] *E.g.*, Tiller v. Atlantic Coast Line R.R., 318 U.S. 54 (1943), in which Justice Black's opinion of the Court initiated the line of cases here considered; Bailey v. Central Vermont Ry., 319 U.S. 350 (1943); Tennant v. Peoria & Pekin Union Ry., 321 U.S. 29 (1944). *See* Rogers v. Missouri Pacific R.R., 352 U.S. 500, 507–510 (1957). Trial by jury is "part and parcel of the remedy afforded railroad workers" under the FELA. Bailey v. Central Vermont Ry., 319 U.S. at 354. "The difference between the majority and minority of the Court in our treatment of FELA cases concerns the degree of vigilance we should exercise in safeguarding the jury trial—guaranteed by the Seventh Amendment." Harris v. Pennsylvania R.R., 361 U.S. 15, 17 (1959) (Justice Douglas concurring). "[T]his Court is vigilant to exercise its power of review . . . to correct instances of improper administration of the Act and to prevent its erosion by narrow and niggardly construction." Rogers v. Missouri Pacific R.R., 352 U.S. at 509.

[73] Ferguson v. Moore-McCormack Lines, 352 U.S. 521, 524 (1957) (Justice Frankfurter dissenting), contains a lengthy review and critique of the Court's practice.

jury trial has been impaired by court usurpation of the jury function, cases under the FELA, which retained the common-law requirements of negligence as a prerequisite to recovery, involved peculiarly difficult decisions as to the adequacy of proof of negligence. "Special and important reasons for the grant of certiorari in these cases are certainly present," the Court wrote in a leading case, "when lower federal and state courts persistently deprive litigants of their right to a jury determination."[74] The operating test was: "Under this statute the test of a jury case is simply whether the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought. It does not matter that, from the evidence, the jury may also with reason, on ground of probability, attribute the result to other causes, including the employee's contributory negligence. Judicial appraisal of the proofs to determine whether a jury question is presented is narrowly limited to the single inquiry whether, with reason, the conclusion may be drawn that negligence of the employer played any part at all in the injury or death." Similar issues have arisen under such statutes as the Jones Act[75] and the Safety Appliance Act.[76]

"Judges are to fix their sights primarily to make that appraisal and, if that test is met, are bound to find that a case for the jury is made out whether or not the evidence allows the jury a choice of other probabilities."[77] A persistent dissent in the line of cases expressed the fear that in FELA cases "anything that a jury says goes, with the consequences that all meaningful judicial supervision over jury verdicts in such cases has been put at an end. . . . If so, . . . the time has come when the Court should frankly say so. If not, then the Court should at least give expression to the standards by which the lower courts are to be guided in these cases."[78]

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[74] Rogers v. Missouri Pacific R.R., 352 U.S. 500, 510 (1957).

[75] Schulz v. Pennsylvania R.R., 350 U.S. 523 (1956); Ferguson v. Moore-McCormack Lines, 352 U.S. 521 (1957); Michalic v. Cleveland Tankers, 364 U.S. 325 (1960). *See also* Senko v. La Crosse Dredging Corp., 352 U.S. 370 (1957); A. & G. Stevedores v. Ellerman Lines, 369 U.S. 355 (1962).

[76] Ferguson v. Moore-McCormack Lines, 352 U.S. 521, 525 n.2 (1957) (Justice Frankfurter dissenting).

[77] Rogers v. Missouri Pacific R.R., 352 U.S. at 507. The cases are collected id. at 510 n.26. The cases are tabulated and categorized in Wilkerson v. McCarthy, 336 U.S. 53, 68–73 (1949) (Justice Douglas concurring), and Harris v. Pennsylvania R.R., 361 U.S. 15, 16–25 (1959). *See also* Harrison v. Missouri Pac. R.R., 372 U.S. 248 (1963); Basham v. Pennsylvania R.R., 372 U.S. 699 (1963).

[78] Harris v. Pennsylvania R.R., 361 U.S. 15, 27–28 (1959) (Justice Harlan dissenting). *See also* Ferguson v. Moore-McCormack Lines, 352 U.S. 521, 524 (1957) (Justice Frankfurter dissenting); Dick v. New York Life Ins. Co., 359 U.S. 437, 447 (1959) (Justice Frankfurter dissenting).

Appeals From State Courts to the Supreme Court

The clause of the Amendment prohibiting the re-examination of any fact found by a jury is not restricted in its application to suits at common law tried before juries in courts of the United States. It applies equally to a case tried before a jury in a state court and brought to the Supreme Court on appeal.[79] Note, however, that the Court has frequently indicated that in cases involving a claim of a denial of constitutional rights it is free to examine and review the evidence upon which lower court conclusions are based, a position that under some circumstances could conflict with the principle of jury autonomy.[80]

[79] The Justices v. Murray, 76 U.S. (9 Wall.) 274, 278 (1870); Chicago, B. & Q. R.R. v. City of Chicago, 166 U.S. 226, 242–46 (1897).

[80] *See* Time, Inc. v. Pape, 401 U.S. 279, 284–92 (1971), and cases cited therein.