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TRIAL PRACTICE—DEMURRER UPON EVIDENCE AS A DEVICE FOR TAKING A CASE FROM THE JURY—By far the oldest of the common law devices for taking a case away from a jury is the demurrer upon evidence. A reported instance of its use appears as early as 1456.[1]

To the modern lawyer familiar with demurrers to pleadings and similar motions, the *modus operandi* of this ancient procedure will not be altogether strange. It was used by a defendant, after the plaintiff's evidence was in and he had rested his case, to challenge the sufficiency of that evidence to warrant a verdict and judgment for the plaintiff. The defendant tacitly admitted the plaintiff's evidence to be true, but claimed that even so and construing it as strongly as possible in the plaintiff's favor, it did not entitle him to a verdict and judgment.[2] If the court, taking the plaintiff's evidence as true and giving to him the benefit of every inference of fact which a jury might reasonably draw from such evidence, agreed with the defendant that it was insufficient to maintain the issue, the demurrer would be sustained and a judgment entered for the defendant.[3] On the other hand, if the court determined

[1] Prior of Tikeford v. Prior of Caldwell, Y. B., 34 Hen. 6, p. 36, 7 (1456), translated in THAYER, CASES ON EVIDENCE, 2d ed., 201 (1900).

[2] Newis v. Lark and Hunt (Scholastica's Case), 2 Plowden 403, 75 Eng. Rep. 609 (1571). For the form of a demurrer upon evidence see TIDD, PRACTICAL FORMS 160 (1779).

[3] Carrington v. Caller, 2 Stew. (Ala.) 175 (1829); Burton v. Brashear, 3 A. K. Marsh. (10 Ky.) 276 (1821); Forbes v. Church, 3 Johns. Cas. (N. Y.) 159 (1802); Stephens v. White, 2 Wash. (Va.) 203 (1796).

that the jury could reasonably have returned a verdict against the defendant on the strength of the evidence demurred upon, the demurrer would be overruled and a judgment entered for the plaintiff.[4]

A plaintiff could also demur upon the defendant's evidence, if, by reason of having pleaded an affirmative defense, the burden of proof was on the defendant.[5] The party having the burden of proof could not, however, demur upon the evidence,[6] since an adjudication that his adversary's defensive evidence was inadequate would not determine the question whether his own evidence was sufficient in law to maintain the issue. And, obviously, he could not demur upon his own evidence so as to admit the truth thereof.

A demurrer upon evidence was proper only at the conclusion of the evidence demurred upon, usually the plaintiff's. If the defendant proceeded, after the plaintiff had rested his case, to introduce his own evidence, he waived any claim based upon the inadequacy of the plaintiff's evidence and could not later demur thereon.[7]

To a modern lawyer, the strangest characteristic of the demurrer upon evidence is the finality of the judgment that followed upon its overruling. He is familiar with motions for directed verdicts and, in some jurisdictions, for involuntary nonsuits. The granting of such motions will usually result in judgment against the plaintiff; but their denial will not ordinarily be followed by a judgment against the defendant. Usually, the defendant will proceed with his case in precisely the same manner as if no such motion had been made. If the motion is made at the conclusion of the plaintiff's proofs, the defendant will proceed with the introduction of his defensive evidence; if made at the conclusion of the evidence of both parties, the case will be argued and submitted to the jury.[8]

[4] Cocksedge v. Fanshaw, 1 Dougl. 119, 99 Eng. Rep. 80 (1779); Dearing, Sink & Co. v. Smith & Wright, 4 Ala. 432 (1842); McCreary v. Fike, 2 Blackf. (Ind.) 372 (1830); Chewning v. Gatewood, 5 How. (6 Miss.) 552 (1841); Patrick v. Hallett, 1 John. (N.Y.) 241 (1806); Feay v. DeCamp, 15 Serg. & R. (Pa.) 227 (1826); Trout v. Virginia & Tennessee R. R. Co., 23 Gratt. 619 (1873); Bank of the United States v. Smith, 11 Wheat. (24 U.S.) 171 (1826).

[5] Standley v. Northwestern Mutual Life Ins. Co., 95 Ind. 254 (1883).

[6] Fritz v. Clark, 80 Ind. 591 (1881); Middleton v. Commonwealth, 1 Litt. (11 Ky.) 347 (1822); Goodman v. Ford, 1 Cush. (23 Miss.) 592 (1852). Cf. the contra practice in the Virginias, infra note 36. The unavailability of a demurrer on evidence to the party having the burden of proof is probably the source of the rule which prevails in some states that a verdict cannot be directed in favor of such a party. See Sunderland, "Directing a Verdict for the Party having the Burden of Proof," 11 MICH. L. REV. 198 (1913).

[7] Catlin, Peeples & Co. v. Gilders, 3 Ala. 536 (1842); Hart v. Calloway, 2 Bibb (5 Ky.) 460 (1811). But cross-examination of plaintiff's witnesses did not preclude defendant from demurring on the evidence. Burton v. Brashear, 3 A. K. Marsh. (10 Ky.) 276 (1821).

[8] See SCOTT, FUNDAMENTALS OF PROCEDURE 98 (1922).

Not so on the old demurrer upon evidence. When his demurrer was overruled, the defendant was finished. He could not thereafter introduce any evidence of his own, nor would the case be submitted to the jury on the basis of the plaintiff's evidence alone. A final judgment against the defendant was entered immediately upon the overruling of his demurrer.[9]

This seemingly harsh doctrine was altogether compatible with and probably resulted from the procedural policy underlying the entire structure of common law pleading, namely, that every case should be reduced to a single issue either of law or of fact and then determined upon the basis of that issue.[10] In the pleading stage of a cause, considerable latitude was allowed to the parties in arriving at the particular issue upon which decision of the case would hinge; but once a proper issue was reached, its determination was conclusive. For example, a defendant might demur to the plaintiff's declaration and raise an issue of law or he might enter a plea and raise an issue of fact. But he could not, under the original scheme of common law pleading, do both, either concurrently[11] or successively. If he chose to demur on the law and was overruled, he could not thereafter plead on the facts. When his demurrer was overruled, final judgment was entered against him.[12]

The demurrer upon evidence operated in precisely the same fashion. Defendant was not required to demur. Instead, after plaintiff had rested, he could proceed with the introduction of his own defensive evidence. But if he chose to demur, the die was irrevocably cast and if he lost, it was final.

Except for the amount of damages if the demurrer should be overruled, there was nothing further for a jury to do in a case, after issue was joined on a demurrer upon evidence. The jury originally impanelled to try the case was accordingly discharged.[13] But since the overruling of the demurrer did not determine the *quantum* of the damages, that issue might be submitted to the jurors before their discharge and a conditional verdict taken for use in the event of a judgment for the plaintiff on the demurrer. Or the matter of damages might be left to await decision on the demurrer. Then, if judgment was for the

[9] Id. 94; Gluck v. Cox, 90 Ala. 331, 8 S. 161 (1889); Garrett v. Reid-Cashion Land & Cattle Co., 34 Ariz. 245, 270 P. 1044, 34 Ariz. 482, 272 P. 918 (1928); Golden v. Knowles, 120 Mass. 336 (1876); Hall v. Browder's Administrators, 4 How. (5 Miss.) 224 (1840); Galveston, Harrisburg & San Antonio Ry. Co. v. Templeton, 87 Tex. 42, 26 S. W. 1066 (1894).

[10] Simpson, "A Possible Solution of the Pleading Problem," 53 HARV. L. REV. 169 at 173 (1939).

[11] Haiton v. Jeffreys, 10 Mod. 280, 88 Eng. Rep. 728 (1715).

[12] GAVIT, CASES AND MATERIALS ON INTRODUCTION TO LAW AND THE JUDICIAL PROCESS 4 (1936).

[13] Hall v. Browder's Administrators, 4 How. (5 Miss.) 224 (1840).

plaintiff, damages could be assessed by a new jury on a writ of inquiry.[14] This was the preferred and most usual course at common law.[15]

In the later days of common law pleading, an unsuccessful demurrant to the pleadings was usually permitted to "plead over" and raise an issue of fact, notwithstanding his defeat on the issue of law raised by his demurrer.[16] But the discharge of the jury upon the joinder of issue on a demurrer upon evidence precluded any similar relaxation in respect to the finality which attached to the overruling of such a demurrer. And it would have been impracticable not to discharge them. Under the English *nisi prius* system of courts, all the proceedings in a case other than the actual trial to the jury took place before the court at Westminster.[17] This included the decision upon a demurrer upon evidence.[18] When issue was joined on such a demurrer, it clearly would have been impossible to hold the jury together until the record could be returned to and the demurrer disposed of by the court at Westminster.

A demurrer upon evidence was required to be in writing.[19] Further, it was required to contain a statement of the evidence demurred upon.[20] This also was probably a consequence of the *nisi prius* system. As already mentioned, the decision of a demurrer upon evidence was a matter for the court at Westminster. But the judges there, with the possible exception of one of them who might have presided at the *nisi prius* hearing, would be total strangers to the evidence which had been presented at such hearing. To acquaint them with it, so that they might

[14] Darrose v. Newbott, Cro. Car. 143, 79 Eng. Rep. 726 (1629); Herbert v. Walters, 1 Ld. Raym. 59, 91 Eng. Rep. 935 (1695); Gluck v. Cox, 90 Ala. 331, 8 S. 161 (1889); McCreary v. Fike, 2 Blackf. (Ind.) 374 (1830); Lindley v. Kelley, 42 Ind. 294 (1873). On the hearing on the writ of inquiry, the unsuccessful demurrant was permitted to put in proofs on the issue of damages. Obaugh v. Finn, 4 Ark. 110 (1842). Of course, the court could determine the damages if they were liquidated, Nuttall's Administrator v. M'Donald, 6 Call. (10 Va.) 53 (1806); Mapel v. John, 42 W. Va. 30, 24 S. E. 608 (1896); or if both parties consented, Strough v. Gear, 48 Ind. 100 (1874).

[15] Darrose v. Newbott, Cro. Car. 143, 79 Eng. Rep. 726 (1629). Cf. Young v. Foster, 7 Port. (Ala.) 420 (1838), where the technique of the conditional verdict is said to be preferred.

[16] SHIPMAN, COMMON LAW PLEADING, 3d ed., 287 (1923).

[17] SCOTT & SIMPSON, CASES ON JUDICIAL REMEDIES 9 (1938).

[18] 3 BLACKST. COMM., Cooley's ed., 372 (1884).

[19] Hinote v. Simpson & Co., 17 Fla. 444 (1880); Creach v. Taylor, 2 Scamm. (3 Ill.) 277 (1840); Golden v. Knowles, 120 Mass. 336 (1876); Stiles v. Inman, 55 Miss. 469 (1877).

[20] Skinner Manufacturing Co. v. Wright, 51 Fla. 324, 41 S. 28 (1906); Lindley v. Kelley, 42 Ind. 294 (1873); Stiles v. Inman, 55 Miss. 469 (1877). Where the plaintiff demurred on the defendant's evidence (the latter having the burden of proof), the evidence of both parties was required to be set out in the demurrer. Strough v. Gear, 48 Ind. 100 (1874).

judge of its sufficiency, a statement of the evidence was required to be incorporated into the demurrer itself and thus made a part of the record.

To complete the issue on a demurrer upon evidence, a joinder by the plaintiff was necessary,[21] just as, at common law, it was necessary that there be a joinder in a demurrer to pleadings.[22]

Prior to 1600, the joinder by the plaintiff in the defendant's demurrer apparently was optional with him.[23] But in that year *Baker's Case,* reported by Coke as imposing the duty upon the plaintiff in all cases to join in the defendant's demurrer,[24] put an end to the consensual nature of the joinder in demurrer,[25] except in criminal cases.[26]

It has already been mentioned that on a demurrer upon evidence, the defendant admitted the truth of the plaintiff's evidence and that the court was bound to construe such evidence as strongly as possible in the plaintiff's favor. Or, as it was sometimes stated, the defendant admitted to be true all those facts which the evidence reasonably tended to prove.

Until 1793, this admission was tacit and implied from the fact of the demurrer, in the same manner that an admission of the truth of the

[21] Creach v. Taylor, 2 Scamm. (3 Ill.) 277 (1840); Golden v. Knowles, 120 Mass. 336 (1876); Dozier v. Anstill & Marshall, 8 S. & M. (16 Miss.) 528 (1847). The lack of a joinder was held not fatal in Gluck v. Cox, 90 Ala. 331, 8 S. 161 (1889), where no objection was taken by the demurrant and both parties proceeded to argue the demurrer.

[22] SHIPMAN, COMMON LAW PLEADING, 3d ed., 288 (1923).

[23] Prior of Tikeford v. Prior of Caldwell, Y.B., 34 Hen. 6, p. 36, 7 (1456), translated in THAYER, CASES ON EVIDENCE, 2d ed., 201 (1900); Anonymous, 1 Dyer 2a, 73 Eng. Rep. 5 (1543); The King v. Muschampt, 1 Dyer 52b, 73 Eng. Rep. 116 (1543); SIR ROBERT HEATH, MAXIMS AND RULES OF PLEADING 95-96 (1694); Newis v. Lark and Hunt (Scholastica's Case), 2 Plowden 403, 75 Eng. Rep. 609 (1571); Reniger v. Fogossa, 1 Plowden 1, 75 Eng. Rep. 1 (1551).

[24] 5 Co. Rep. 104a (1600).

[25] "The plaintiff may not refuse to join in the demurrer, if he is not willing to waive his evidence." Worsley v. Filisker, 2 Rolle 119, 81 Eng. Rep. 697 (1620). See also, Alexander v. Fitzpatrick, 4 Port. (Ala.) 405 (1837); Shields v. Arnold, 1 Blackf. (Ind.) 109 (1820).

[26] Baker's Case, 5 Co. Rep. 104a, 77 Eng. Rep. 216, sub. nom. Middleton v. Baker, Cro. Eliz. 752, 78 Eng. Rep. 983 (1600). For authority for the proposition that the King's Counsel must consent to a demurrer upon evidence in criminal cases Coke cited The King v. Muschampt, 1 Dyer 526, 73 Eng. Rep. 116 (1543). Here the court held that if the King's Counsel refused to join in the demurrer the case should be left to the jury. It is unlikely, however, that this holding was based upon any notion of royal prerogative; rather, it was a simple application to a criminal case of a doctrine that then applied in all cases.

The arbitrary line thus drawn prevailed. Brister v. State, 26 Ala. 107 (1855); Holland v. Florida, 39 Fla. 178, 22 S. 814 (1897); State v. Soper, 4 Shep. (16 Me.) 293 (1839); Doss v. Commonwealth, 1 Gratt. (42 Va.) 557 (1844).

well pleaded allegation in the pleadings was and still is implied in a demurrer to the pleadings.[27] But in that year, the case of *Gibson v. Hunter* went further and laid down the proposition that in a demurrer on evidence the demurrant was required, not merely to recite the evidence, but to state the facts which the evidence tended to prove and formally to admit them to be true.[28] "It was *not* competent," said Lord Chief Justice Eyre, "for the defendants to insist upon the jury being discharged from giving a verdict, by demurring to the evidence, and obliging the plaintiff to join in demurrer, *without distinctly admitting upon the record, every fact, and every conclusion, which the evidence given for the Plaintiff conduced to prove.*"[29]

This was new.[30] The earlier cases established no such requirement for a demurrer on evidence.[31] Neither Coke nor Blackstone mention it. Nor is there anything in the earlier form books to indicate that anything was required in the demurrer other than a mere statement of the evidence.[32]

This was too great a burden for the already antiquated demurrer upon evidence to bear, and no case involving its use appears in the English reports after the decision in *Gibson v. Hunter*.[33] In that case, Lord Eyre had remarked that he had "very confident expectations that a demurrer like the present will never hereafter find its way into this

[27] GAVIT, CASES AND MATERIALS ON INTRODUCTION TO LAW AND THE JUDICIAL PROCESS 4 (1936).

[28] Gibson v. Hunter, 2 H. Bl. 187, 126 Eng. Rep. 499 (1793).

[29] Id. at 209.

[30] THAYER, CASES ON EVIDENCE, 2d ed., 217, note (1900).

[31] In Newis v. Lark and Hunt (Scholastica's Case), 2 Plowden 403, 75 Eng. Rep. 609 (1571), the complete record is prefaced to the report proper. From such record it appears that the demurrant recited the evidence, but he did not state or admit any ultimate facts which the evidence tended to prove.

In Wright v. Pindar, Aleyn 18, 82 Eng. Rep. 892 (1648), sub nom., White v. Pynder, Style 22, 34, 82 Eng. Rep. 499, 509, much relied on by Lord Eyre in Gibson v. Hunter, there is a statement that a defendant may not be admitted to his demurrer, unless he will confess the matter of fact to be true. It is doubtful that this was intended to mean that such confession had to be formal and on the record, as Lord Eyre later asserted. Rather, it was probably intended to mean no more than that a defendant could not demur upon the evidence and at the same time deny the truth of a fact which the evidence tended to prove, as the defendant in Wright v. Pyndar had actually attempted to do.

In Cocksedge v. Fanshaw, 1 Dougl. 119, 99 Eng. Rep. 80 (1779), decided upon a demurrer on evidence only fourteen years before Gibson v. Hunter, the demurrer was in the usual form and did not contain any formal statement or admission of any of the ultimate facts involved. Obviously perplexed by the decision in Gibson v. Hunter, Henry Blackstone appended to his report of the case the record in Cocksedge v. Fanshaw and not very successfully endeavoured to distinguish the two.

[32] See, e.g., TIDD, PRACTICAL FORMS 160 (1779).

[33] THAYER, PRELIMINARY TREATISE ON EVIDENCE 236 (1898).

house." Over a century later Lord Blackburn observed that his Lordship's expectations "have been justified by the result."[34]

In this country, demurrers upon evidence have been little used, especially in those jurisdictions where the requirements of *Gibson v. Hunter* were adopted and adhered to.[35] It was only where the doctrine

[34] Sewell v. Burdick, 10 App. Cas. (H.L.) 74 at 99 (1884).

[35] *Arizona:* Garrett v. Reid-Cashion Land & Cattle Co., 34 Ariz. 245, 270 P. 1044, on rehearing, 34 Ariz. 482, 272 P. 918 (1928), is the only case involving a demurrer on evidence. That it was little understood is evidenced by the fact that the demurrer was in the form of a verbal motion! *Florida:* Gibson v. Hunter was followed in Higgs v. Shehee, 4 Fla. 382 (1852). Demurrers were seldom used thereafter, until 1895, when a statute provided that upon the overruling of a demurrer, the defendant could withdraw it and proceed with his own proofs. Fla. Comp. Gen. Laws (1927) § 4309. This operated to revive the demurrer for a time [e.g., Myers v. Hodges, 53 Fla. 197, 44 S. 357 (1907)], but it does not appear to have been used since Drayton v. State, 78 Fla. 254, 82 S. 801 (1919). *Illinois:* Gibson v. Hunter was followed in Dormady v. State Bank, 2 Scamm. (3 Ill.) 236 (1840); Creach v. Taylor, 2 Scamm. (3 Ill.) 277 (1840); and Crowe v. People, 92 Ill. 231 (1879). The only later case is Indianapolis & St. Louis R. R. Co. v. Link, 10 Ill. App. 292 (1881), although the demurrer is discussed in Rockhill v. Congress Hotel Co., 237 Ill. 98, 86 N. E. 740 (1908), and Marland Refining Co. v. Lewis, 264 Ill. App. 163 (1932). In both these cases, trial was by the court without a jury! *Iowa:* Gibson v. Hunter was followed in Jones v. Ireland, 4 Iowa 62 (1856); Hardin v. Snyder, 15 Iowa 460 (1863); and Coates v. Galena & Chicago Union R. R. Co., 18 Iowa 277 (1865). The demurrer is not heard of thereafter. *Kentucky:* Gibson v. Hunter was followed in White v. Fox, 1 Bibb 369 (1809). The demurrer was occasionally used thereafter, e.g., Chapize v. Bane, 1 Bibb (4 Ky.) 612 (1809); Burton v. Brashear, 3 A. K. Marsh (10 Ky.) 276 (1821), but not since Ditto & Lansdale v. Ditto's Administrators, 4 Dana (34 Ky.) 502 (1836). *Louisiana:* No case involving a demurrer on evidence appears after Skilliman v. Jones, 3 Mart. (N. S.) 686 (1825), where Gibson v. Hunter was followed. *Maine:* In State v. Stoyell, 54 Me. 24 (1866), the demurrer is referred to as "obsolete." No later cases appear. *Maryland:* Gibson v. Hunter was adopted in Forbe's v. Perrie's Administrator, 1 Harr. & J. (5 Md.) 109 (1801). No later cases appear. *Massachusetts:* Copeland v. New England Ins. Co., 22 Pick. (39 Mass.) 135 (1839), followed the rule of Gibson v. Hunter, after which the demurrer was little used. Golden v. Knowles, 120 Mass. 336 (1876), appears to be the last case. *Mississippi:* Waul v. Kirkman, 5 Cush. (27 Miss.) 823 (1854), and Western Assurance Co. v. Mayer, 64 Miss. 795, 2 S. 173 (1887), are in accord with Gibson v. Hunter. Holmes v. Preston, 70 Miss. 152, 12 S. 292 (1892), is the last case. *New Mexico:* Pino v. Hatch, 1 N. M. 125 (1855), which followed Gibson v. Hunter, is the only case involving a true demurrer on evidence. *New York:* The demurrer on evidence is said to be no longer available, in Colegrove v. N. Y. & N. H. R. R. Co., 20 N. Y. 492 (1859). *North Carolina:* Gibson v. Hunter was followed in Nelson v. Whitfield, 82 N. C. 46 (1880). There are no cases involving true common law demurrers after Bond v. Wool, 107 N. C. 139, 12 S. E. 281 (1890). *Ohio:* Demurrers on evidence have not been used since Chappelear v. Martin, 45 Ohio St. 126, 12 N. E. 448 (1887). *Pennsylvania:* Gibson v. Hunter was followed in Ross & Vaughan's Lessee v. Eason, 4 Yeates 54 (1796). Later cases permitted the facts to be stipulated on the record, rather than stated and admitted in the demurrer itself, Duerhagen v. United States Ins. Co., 2 Serg. & R. (Pa.) 185 (1816), but even this

of that case was repudiated or ignored that they were resorted to with any degree of frequency.[36] In some states, they apparently have never

does not always seem to have been required. E.g., in Feay v. DeCamp, 15 Serg. & R. (Pa.) 227 (1826), the requisite admissions appear to have been tacit and implied from the fact of the demurrer. No civil case involving a demurrer upon evidence appears after McKowen v. McDonald, 43 Pa. St. 441 (1862). *Tennessee:* Gibson v. Hunter was followed in Bedford v. Ingram, 5 Hayw. (3 Tenn.) 155 (1818). The demurrer is not heard of again until Hopkins v. Railroad, 12 Pick. (96 Tenn.) 409, 34 S. W. 1029 (1896), where it appears to be sufficient to append to the demurrer a mere general admission that the evidence stated and all proper inferences therefrom are true. There are a few later cases, but none since Nashville, Chattanooga, & St. L. R. R. Co. v. Sansom, 5 Cates (113 Tenn.) 683, 84 S. W. 615 (1905). *Texas:* Booth v. Cotton, 13 Tex. 359 (1855), followed Gibson v. Hunter, but some later cases seem to have ignored the requirement of a formal admission. See, e.g., Hughes v. Christy, 26 Tex. 231 (1862), and International & G. N. Ry. Co. v. Davis, 17 Tex. Civ. App. 340, 43 S.W. 540 (1897). No cases involving demurrers appear after Chicago, R. I. & P. R. R. Co. v. Cleaver, 48 Tex. Civ. App. 294, 106 S.W. 721 (1908). *Vermont:* In Bass v. Rublee, 76 Vt. 395, 57 A. 965 (1904), there is an elaborate dictum in accord with Gibson v. Hunter. There seem to be no other cases. *United States:* Gibson v. Hunter was followed in Fowle v. Common Council of Alexandria, 11 Wheat. (24 U.S.) 320 (1826). There are only a few cases thereafter. See Slocum v. N. Y. Life Ins. Co., 228 U.S. 364, 33 S. Ct. 523 (1913).

[36] In Alabama, the necessity for compliance with the rule of Gibson v. Hunter was questioned in Young v. Foster, 7 Port. 420 (1838), and subsequently ignored. See, e.g., Dearing, Sink & Co. v. Smith & Wright, 4 Ala. 432 (1842); Holman v. Whiting, 19 Ala. 703 (1851). As a consequence, there are numerous cases involving its use. Two recent ones are McCarty v. Williams, 212 Ala. 232, 102 S. 133 (1924), and Southeastern Greyhound Lines v. Berrie, 31 Ala. App. 178, 13 S. (2d) 696 (1943), in the latter of which the procedure is referred to as "novel."

In Indiana, the doctrine of Gibson v. Hunter was rejected. See Indianapolis & Vincennes R. R. Co. v. McLin, 82 Ind. 435 (1882). And demurrers were much used for a time. See Lake Shore & M. S. Ry. Co. v. Foster, 104 Ind. 293, 4 N.E. 20 (1885); Milburn v. Phillips, 136 Ind. 680, 34 N.E. 983, 36 N.E. 360 (1893); and cases cited. But no case involving their use appears after Plaskett v. Benton-Warren Agricultural Society, 45 Ind. App. 358, 89 N.E. 968 (1909).

In the Virginias, the demurrer on evidence was much used, even into modern times, due to the inability of the courts either to nonsuit a plaintiff against his consent [Thweat & Hinton v. Finch, 1 Wash. (Va.) 217 (1793)], or to direct a verdict [Keel & Roberts v. Herbert, 1 Wash. (Va.) 203 (1793)]. But the common law pattern was considerably altered. Gibson v. Hunter was repudiated [Whittington v. Christian, 2 Rand. (23 Va.) 353 (1824)]; the demurrer could be interposed at the close of all the evidence, not merely at the conclusion of the plaintiff's evidence [Hoyle v. Young, 1 Wash. (Va.) 150 (1793); Adkins v. Fry, 38 W. Va. 549, 18 S.E. 737 (1893)]; and it was available to either party regardless of the burden of proof [Bonos v. Ferries Co., 113 Va. 495, 75 S.E. 126 (1912); Conner v. Jarrett, 120 W. Va. 633, 200 S.E. 39 (1938)]. It is unlikely, however, that even this modified demurrer will continue long to be much used, in view of the present power of the court in West Virginia to direct a verdict [White v. Hoster Brewing Co., 51 W. Va. 259, 41 S.E. 180 (1902); Soward v. American Car & Foundry Co., 66 W. Va. 266, 66 S.E. 329 (1909)], and the recent development in Virginia of a motion to strike out or exclude the evidence [Green v. Smith, 153 Va. 675, 151 S.E. 282 (1930)].

been used at all,[37] although the name "demurrer on evidence" is occasionally employed to describe what really is no more than a motion for a directed verdict.[38]

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[37] California, Colorado, Connecticut, Delaware, Georgia, Idaho [see Dunlap v. Savage, 54 Idaho 87, 29 P. (2d) 493, (1934)], Kansas, Michigan, Minnesota, Missouri [see Diamond Rubber Co. v. Wernicke, 166 Mo. App. 128, 148 S.W. 160 (1912); Proctor v. Garman, 203 Mo. App. 106, 218 S.W. 910 (1920)], Montana, Nebraska, Nevada, New Hampshire, New Jersey, North Dakota, Oklahoma, Oregon, Rhode Island, South Carolina, South Dakota, Utah, Washington, Wisconsin and Wyoming. In Arkansas, it was said in Grooms v. Neff Harness Co., 79 Ark. 401, 96 S. W. 135 (1906), that demurrers on evidence were unknown. But see Obaugh v. Finn, 4 Ark. 110 (1842).

[38] State v. Jackson, 283 Mo. 18, 222 S.W. 746 (1920); Dunn v. Bozarth, 59 Neb. 244, 80 N.W. 811 (1899); Merchants Bank v. Dunn, 41 N.M. 432, 70 P. (2d) 760 (1937); State v. Burton, 138 N.C. 575, 50 S.E. 214 (1905); Kansas City S. Ry. Co. v. Tucker, 108 Okla. 259, 236 P. 35 (1925); Brown v. Lewis, 50 Ore. 358, 92 P. 1058 (1907). See also, Kansas Gen. Stat. Ann. (Corrick, 1935) § 60–2909; Mich. Stat. Ann. (1938) §§ 27.1036, 27.1037.

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