St. George Tucker, Spencer Roane, and the Virginia Court of Appeals, 1804-1811

Charles F. Hobson

St. George Tucker (1752-1827) played an important role in the legal history of post-Revolutionary Virginia and indeed of the new nation. He is best known in the legal community for his 1803 edition of *Blackstone's Commentaries.* Tucker was also a judge, sitting more than three decades on Virginia's superior courts and on the U.S. District Court. This paper draws on Tucker's voluminous law notes and correspondence to consider his career as a judge of the Court of Appeals from 1804 to 1811. It follows a narrative arc in which Tucker joined the appellate bench flush with the honor of being elected by the General Assembly to this high office, only to resign after seven years, bitterly disillusioned with the capriciousness of legislatures in a republican commonwealth. Not only had the General Assembly ignored his efforts to improve the judicial system but, worse, it had shown a troubling disregard for the principle of judicial independence. Tucker's unhappy tenure was also marked by growing tension between him and Spencer Roane, which erupted into open confrontation in the spring of 1809.

Thomas Jefferson on Judicial Independence: The Early Years

David T. Konig

Thomas Jefferson's well known antagonism toward the federal judiciary has created an image of general hostility toward the judicial role. Conventionally, he is seen as a champion of legislative supremacy and an opponent of judicial independence. Seen most commonly as an abstract natural rights philosopher and champion of a Lockean right of revolution, Jefferson seems to remain outside an American judicial tradition shaped by sitting judges such as John Marshall, Joseph Story, or James Kent.

The present paper challenges that conventional wisdom by examining Jefferson's early years, when he studied law under George Wythe and practiced law in Virginia's high court. His foundational thinking about law, it must be remembered, occurred *before* Independence, at a time when radical reform based on universal rights was largely unthinkable. Instead, Jefferson studied and practiced within an existing, well establish English legal tradition. Its whig tradition of rights was peculiar to the Anglo-American tradition, and Jefferson studied and practiced within a tradition of protecting such rights rather than articulating new ones.

Central to that tradition was the judge – specifically, the whig judge epitomized by the man he considered "the greatest lawyer England ever had, except Coke." In his *Legal Commonplace Book* (which I am now co-editing for The Papers of Thomas Jefferson), we find that Jefferson gave disproportionate attention to Holt's decisions, citing him by name in 10% of the cases he commonplaced. More significantly, Jefferson cited a dozen dissents by Holt, challenging the settled law of the empire. From Holt and the constitutional struggles of the era of the Glorious Revolution, Jefferson took note of the value of judicial independence and the interpretation of statutes as a check on arbitrary power exerted by Crown or Parliament. It was

this background that informed his early revolutionary activities, and culminated in *A Summary View of the Rights of British America* in 1774.

Directed Verdict and the Search for Efficient Jury Control in the United States

Renée Lettow Lerner

Directed verdict is one among many possible tools to control a jury. This paper will examine the practice's growth in the United States against its rivals in the eighteenth and nineteenth centuries, its departure from English practice, and its fate in the twentieth century. The paper will also touch upon the practice's possible unconstitutionality under the Seventh Amendment.

Discussions of directed verdict tend to be plagued by confusion over terminology; in this paper, the term means a direction by a judge to find a particular verdict that the jury cannot go against. English practice in the late eighteenth century knew at most a limited form of directed verdict, not as broad as the practice became in the United States in the nineteenth century. English judges, however, had other powerful means at their disposal to guide the jury, especially a robust power to comment on evidence.

As American judges began to lose the power to comment on evidence to the jury in the nineteenth century, this paper argues, courts and state legislatures began to turn to directed verdict as a substitute. (Demurrer to the evidence was another potential substitute, but it never became popular in most states because of the burden it put on the demurring party to concede the opponent's factual claims.) Later in the nineteenth century and into the twentieth, directed verdict came to be viewed as a necessary corrective to an excess of new trials awarded. New trial was an expensive method of jury control; the case had to be tried again before a new jury. Directed verdict was cheaper than its rival, new trial; the judge's decision to direct a verdict ended the case, except for appeal.

Directed verdict, although efficient, was open to the charge that it was unconstitutional under the Seventh Amendment, and this paper explores those arguments.

In the end, directed verdict lost out to the new form of summary judgment set out in the Federal Rules of Civil Procedure in 1938, which had the advantages of demurrer without the great disadvantage of a party having to concede its opponent’s factual claims.

Only Thirteen Shillings: Abusing the English System of Public Justice
in the Late Eighteenth Century

James C. Oldham

This thirteen-shilling tempest started in 1786 in a local Court of Requests in Yarmouth, then generated, sequentially, a perjury indictment, three jury trials at the assizes (all before special juries), a jury verdict for 3,000 pounds with costs of 800 pounds (including at least 600 pounds in a legal fee to Thomas Erskine), an indictment for libeling the public justice of England, and a fourth jury trial (also before a special jury). Among the questions that the proceedings invite are: How open to challenge were jury verdicts? Could a jury verdict be thrown out based on a post-trial affidavit of one or more of the jurors claiming that the verdict had been reached by an improper method? How impressionable were the jurors, even special jurors, in response to the particular skills of the barristers? Who ultimately paid for the preparation and conduct of this pile of proceedings, and what was the final cost?