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Article 57

"Quotient Verdict" Illegal; "Averaging" Legal

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further provided that upon motion made within one year following a removal from the calendar, an action which has been removed may be replaced at the foot thereof.[219]

The court's conclusion that it may replace the action only at the foot of the calendar under the present rules may be seen more clearly by reference to the prior rules. The rules effective in 1958 (but now superseded) state that if a motion to restore the action to the calendar is granted, "the action must be placed at the foot of the general trial calendar; provided, however, that for good cause shown . . . the justice presiding in his discretion may order the action placed in any other appropriate calendar position." [220] The last clause, allowing judicial discretion to determine the calendar position upon restoration, is not contained in the present rules.

The court further reasoned that even though both parties consented, a restoration would defeat the purpose of the rule, which is to penalize a dilatory party.[221]

The practitioner's attention is called to the fact that if he fails to have the action restored within one year of its removal, the action "shall be dismissed . . . for neglect to prosecute." [222]

In conclusion, if the practitioner requires longer than the one year to file his statement of readiness, he may obtain an extension, upon motion to the court,[223] which will be granted if good cause is shown.

ARTICLE 41 — TRIAL BY A JURY

"Quotient verdict" illegal; "averaging" legal.

The New York City Civil Court in denying defendant's motion to set aside a jury's verdict, explained in detail the methods by which a jury may arrive at its verdict.[224] The defendant in this case based his motion on statements made by the jury foreman when he announced the verdict. When questioned as to the jury's decision the foreman stated, "it [the verdict] was decided upon by the Jury, an average method. . . ." Thereafter the jury was polled and found to be unanimous in its decision. After being polled, the foreman, in answer to a question by the defendant's attorney, stated that "the amount of money was arrived at by averaging."

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[219] N.Y. APP. DIV. R. VIII, pt. 7 (2d Dep't 1964).

[220] CLEVENGER, PRACTICE MANUAL 21-17 (1958 ed.).

[221] *Supra* note 218.

[222] CPLR 3404. The statute of limitations consequences of a dismissal for neglect to prosecute should be borne in mind here. See CPLR 205.

[223] *Supra* note 219.

[224] Honigsberg v. New York City Transit Authority, 43 Misc. 2d 1, 249 N.Y.S.2d 296 (Civ. Ct. 1964).

With the above statements as defendant's evidence, the court proceeded to define the different types of verdicts. The most common of the illegal verdicts is the "compromise verdict." This is a verdict arrived at when a juror surrenders a conscientious conviction on one material issue in return for the relinquishment by another juror of his conscientious conviction on another issue. The court was quick to point out that jurors may give weight to the opinions of other jurors and reasonable concessions may be made. Thus, to set aside a verdict as being one of compromise, it must appear that a conscientious conviction was sacrificed. The compromise verdict may be detected by the fact that a given verdict cannot be found consistent with any version of the proof.

The decision then proceeded to distinguish the "quotient verdict," which is illegal, from a legal verdict arrived at by averaging. The "quotient verdict" results from an agreement pursuant to which each juror writes down the amount of damages he would award and the twelve figures are averaged to arrive at the amount of damages. The fact that each juror discloses his own figure as to damages does not in and of itself make the verdict illegal. The essential element of the illegality of the "quotient verdict" is the prior agreement to be *bound* by the result of the computation.[225]

Having defined these concepts, the court held that the verdict here was not shown to have been arrived at by an illegal method. The presumption is that no illegal arrangements were made and therefore the party attempting to overturn a verdict must affirmatively show that it was arrived at by improper means.[226] Herein lies the difficulty for the practitioner. How does one sustain the burden of proof in this instance? "It is well settled that a juror is not competent to impeach his verdict. . . ." [227] Therefore, proof must be given by someone other than a juror. The court, sustaining the verdict at bar, did not have occasion to investigate the difficult questions of proof invariably attendant upon overturning a verdict on the basis of something that occurred in the jury room.

ARTICLE 52 — ENFORCEMENT OF MONEY JUDGMENTS

Contempt of court for disobedience of article 52 subpoena.

In *James v. Powell* [228] an interesting contention was made by the contemnor's attorney. Defendant-contemnor is a rather re-

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[225] *Id.* at 5, 249 N.Y.S.2d at 302.
[226] *Id.* at 6, 249 N.Y.S.2d at 303.
[227] PRINCE, RICHARDSON ON EVIDENCE § 423 (9th ed. 1964).
[228] 43 Misc. 2d 314, 250 N.Y.S.2d 635 (Sup. Ct. 1964).