

## Less Than Unanimous Verdict in Civil Actions

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LESS THAN UNANIMOUS VERDICT IN CIVIL ACTIONS.—At the last election, the people of the state of New York voted upon an amendment to the State Constitution<sup>1</sup> whereby the legislature is empowered to provide by law that a verdict may be rendered by not less than five-sixths of the jurymen constituting a jury in any civil case, and at the present time, a law in accordance with this constitutional provision is pending in the legislature.

The tendency in judicial proceedings has been increasingly towards simplifying methods and procedure for purposes of expediency—that is, to shorten both the time and the cost of litigation. Until the creation of the Judicial Council,<sup>2</sup> there were no official statistics on the subject, but since that body has started to function, a great deal of material has been gathered showing the shortcomings of the present system and enabling an estimate of the benefit of this change.<sup>3</sup>

Where the jury is unable to agree, the case is remanded for a new trial, which works delay and adds to the cost, so as often to make the cause upon its merits a trivial matter in comparison to the accumulated costs and expenses. While the principal argument advanced for the adoption of a less than unanimous verdict of the jury is the saving in time and money to both the state and the litigants, there is also the phase presented by compromise verdicts rendered in order to avoid disagreements, which do not effect the justice which the situation requires.<sup>4</sup> Where the verdict is clearly against the weight of the evidence, the trial judge is given the discretion<sup>5</sup> to set the verdict aside and grant a new trial, which brings about the same effect as if the jury had been unable to come to an agreement.<sup>6</sup> However, where the case is not quite so clear, these forced compromises are not set aside, but are allowed to decide the matter.<sup>7</sup>

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<sup>1</sup> N. Y. CONST. art. I, § 2, amended as follows: "The legislature may provide, however, by law, that a verdict may be rendered by not less than five-sixths of the jurymen constituting a jury in any civil case."

<sup>2</sup> N. Y. LAWS 1934, c. 128.

<sup>3</sup> See Saxe, *Civil Judicial Statistics* (1935) 10 ST. JOHN'S L. REV. 1, at 21, 22; *Editorial*, 94 N. Y. L. J. 1168, Oct. 8, 1935.

<sup>4</sup> *Hamilton v. Oswego Water Works*, 22 App. Div. 573, 48 N. Y. Supp. 106, *aff'd*, 163 N. Y. 529, 57 N. E. 1111 (1897); *Driscoll v. Nelligan*, 46 App. Div. 324, 61 N. Y. Supp. 692 (1899); *McCormick v. Rochester Ry.*, 133 App. Div. 760, 117 N. Y. Supp. 1110, *aff'd*, 198 N. Y. 510, 92 N. E. 1090 (1909).

<sup>5</sup> N. Y. CIV. PRAC. ACT art. 36, § 549.

<sup>6</sup> *Miller v. Barker Rose & Clinton Co.*, 173 App. Div. 186, 158 N. Y. Supp. 865 (1916); *Cannarozzo v. New York State Railways*, 216 App. Div. 243, 215 N. Y. Supp. 156 (1926); *Dingman v. Saratoga Taxi Co.*, 227 App. Div. 636, 235 N. Y. Supp. 793 (1929); *Graley v. American Eagle Fire Ins. Co.*, 235 App. Div. 490, 257 N. Y. Supp. 566 (1932).

<sup>7</sup> *Driscoll v. Nelligan*, 46 App. Div. 324, 61 N. Y. Supp. 692 (1899); *Silberberg v. M. Ascher Silk Corp.*, 208 App. Div. 766, 203 N. Y. Supp. 193 (1924); *E. Candia & Co., Inc. v. Rubin*, 209 App. Div. 357, 204 N. Y. Supp. 590 (1924); *Gouch v. Republican Storage Co., Inc.*, 125 Misc. 791, 211 N. Y. Supp. 433 (1925).

Since it is within the discretion of the trial judge to direct the verdict<sup>8</sup> or to set the verdict of the jury aside and grant a new trial,<sup>9</sup> the deliberation and verdict of the jury are often a mere formality, so that dispensing entirely with the jury, in certain types of cases, might not work a hardship. However, this is merely pointed out in order to show that the elimination of the requirement of a unanimous verdict by the jury in civil actions would be a small loss. Where there is more than one judge sitting on a case, it is not required that their decision be unanimous to decide the case.

Many of the states have been adopting laws permitting less than a unanimous verdict of the jury in civil cases. However, any legislation authorizing a verdict by less than the whole number of jurors in any case where a jury trial is a matter of right is unconstitutional<sup>10</sup> unless such legislation is expressly authorized by a constitutional provision.

The right to a trial by jury is one of the oldest of the personal rights claimed by English-speaking people. It was secured to the people of England by the Magna Carta, and has subsequently been embodied in every constitution and similar document adopted both in England and in the United States.

The Constitution of the United States has as its Seventh Amendment the provision that in suits at common law, where the value in controversy was more than \$20.00, "the right of trial by jury shall be preserved." The essential elements of a trial by jury, as understood and applied at the common law, were threefold, namely, (1) that the jury consist of twelve, no more, no less; (2) that the trial be in the presence and under the superintendence of a judge having power to instruct the jury as to the law and advise them in respect to the facts, and (3) that the verdict be unanimous.<sup>11</sup>

However, we live under a government of dual citizenship—that is, we are citizens of the United States and also citizens of the state in which we live. The Constitution of the United States has given to the Federal Government only such authority as was delegated to it by the people in framing the Constitution, and all other authority remains in the states. Each state has also adopted a constitution, wherein it has secured to its citizens the right to a trial by jury. And, according to the power which the people of the state have given to its government in its constitution, the state government has the right to enact its own laws and enforce them.

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<sup>8</sup> N. Y. CIV. PRAC. ACT art. 34, § 457-a.

<sup>9</sup> See note 5, *supra*.

<sup>10</sup> *American Publishing Co. v. Fisher*, 166 U. S. 464 (1897); *Patton v. United States*, 281 U. S. 276, 50 Sup. Ct. 253 (1930); see also *Cruger v. The Hudson River R. R.*, 12 N. Y. 190 (1854).

<sup>11</sup> *Ibid.* It is of course true that the Seventh Amendment does not control the state courts (*St. Louis, etc. R. R. v. Brown*, 241 U. S. 223, 36 Sup. Ct. 602 [1916]).

While a state cannot enact laws in direct contravention of the principles in the Constitution of the United States, that document does not control state laws and procedures,<sup>12</sup> nor were its requirements as to "due process" meant to interfere with the power of the state to protect the lives, liberty and property of its citizens, nor with the exercise of that power in the adjudications of the courts of a state in administering the process provided by the law of the state.<sup>13</sup> Trial by jury was not a privilege or immunity of citizenship which the states were forbidden to abridge, but the requirement of due process of law was met if the trial was had according to the settled course of judicial proceedings.<sup>14</sup>

Since the right to a trial by jury is secured to the people by the Constitution of the United States, it cannot be infringed upon by law or judicial decree, nor can it be impaired by being subjected to unreasonable conditions and restrictions. Also, a denial of any one of the essential elements or incidents of a jury trial is a denial of the right to that mode of trial. On the other hand, it is competent for a state to make any reasonable regulations and conditions as to how the right shall be exercised, so long as it is not denied or materially impaired.<sup>15</sup> The Seventh Amendment, of course, applies to the fed-

<sup>12</sup> *Chicago, R. I. & P. R. R. v. Cole*, 251 U. S. 54, 40 Sup. Ct. 68 (1919); *State v. Hadad*, 142 La. 69, 76 So. 243 (1917); *W. S. Forbes & Co. v. Southern Cotton Oil Co.*, 130 Va. 245, 108 S. E. 15 (1921).

<sup>13</sup> *In re Converse*, 137 U. S. 624 (1891); *Hodgson v. Vermont*, 168 U. S. 262 (1897).

<sup>14</sup> *Walker v. Sauvinet*, 92 U. S. 90 (1875) ("Due process of law is process due according to the law of the land. This process in the States is regulated by the law of the State."); *Holden v. Hardy*, 169 U. S. 366 (1898).

<sup>15</sup> *American Publishing Co. v. Fisher*, 166 U. S. 464, at 468 (1897) ("Power of state to change the rule in respect to unanimity of juries is not before us for consideration."); *Conneau v. Geis*, 73 Cal. 176, 14 Pac. 580 (1887); *State v. Main*, 69 Conn. 123, 37 Atl. 80 (1897); *State v. De Lorenzo et al.*, 81 N. J. L. 613, 79 Atl. 839 (1911); *Stokes v. People*, 53 N. Y. 164 (1873); *People v. Dunn*, 157 N. Y. 528 (1899); *Smith v. Western Pacific Ry.*, 203 N. Y. 499, 96 N. E. 1106 (1911); *McKinney v. State*, 3 Wyo. 719, 30 Pac. 293 (1892).

In those states where a law providing for less than unanimous verdict by jury in civil actions has been declared unconstitutional, the reason has been because the constitutions of those states made no provision for such laws.

In the case of Utah, while a territory, it had come under the jurisdiction of federal law. When adopted as a state and a constitution framed, it was provided therein that the "right of trial by jury shall remain inviolate". Since, under the Federal Constitution, unanimity of verdict is an essential requirement, without further provision in the constitution, Utah could not adopt a law allowing a verdict of a lesser number, and therefore a law passed allowing a verdict of nine of the jurors to govern in civil actions was declared unconstitutional (*American Publishing Co. v. Fisher*, 166 U. S. 464 [1897]; *Springville v. Thomas*, 166 U. S. 707 [1897]).

Where the constitution gave the legislature the right in civil actions to provide juries of less than twelve, such a provision was held not to imply the right to accept a less than unanimous verdict (*Colorado: City of Denver v. Hyatt*, 28 Colo. 129, 63 Pac. 403 [1900]. *North Dakota: Power v. Williams*, 53 N. D. 54, 205 N. W. 9 [1925]; *National Cash Register Co. v. Midway City Creamery Co.*, 53 N. D. 256, 205 N. W. 624 [1925]. *Wyoming: First Nat. Bank of Rock Springs, Wyo. v. Foster*, 9 Wyo. 157, 61 Pac. 466 [1900]).

eral courts only.

Thus, although in Minnesota, it had been held<sup>16</sup> that one of the essential elements of the trial by jury which must be kept inviolate was the unanimity of the verdict, a law providing for a five-sixths verdict, after their constitution had been amended therefor, was held to be constitutional,<sup>17</sup> even in a case under the Federal Employers' Liability Act, holding that even though the cause of action arose out of a federal statute, the law of the forum would apply, the five-sixths jury verdict being applicable to such a case.

In Missouri, it was held<sup>18</sup> that, the constitutional amendment having been validly submitted to the people,<sup>19</sup> no right under the United States Constitution was violated by this constitutional amendment authorizing a verdict in a civil case by three-quarters of the jury.

In many other states,<sup>20</sup> laws providing for less than unanimous jury verdicts in civil actions have been held constitutional, these laws providing for various degrees of required concurrence, and basing same on nature of action, nature of punishment, or nature of court involved.

Although the way for this new system in our judicial structure has been paved by the constitutional amendment, this is merely permissive, and although legislation on the matter has been recommended by the Judicial Council,<sup>21</sup> the legislature has not as yet acted upon the suggestion. There remains the question of procedure in carrying it out. It would not be desirable to have a statute absolutely mandatory

Where the constitution merely provided "the right to trial by jury shall remain inviolate" without further provision for changes in the jury system as it obtained under common law and under federal law, laws providing for less than unanimous jury verdicts were held unconstitutional (*Arkansas: Minnequa Cooperage Co. v. Hendricks*, 130 Ark. 264, 197 S. W. 280 [1917]; *Wells Fargo & Co. Express v. Alexander*, 133 Ark. 600, 199 S. W. 84 [1917]; *Davis v. H. A. Nelson & Son*, 134 Ark. 436, 201 S. W. 511 [1918]. *Indiana: Barlow v. Kellar*, 207 Ind. 686, 194 N. E. 356 [1935]; *Schembri v. Shearer*, 208 Ind. —, 194 N. E. 615 [1935]; *New York C. R. R. v. Hazelbaker*, — Ind. —, 199 N. E. 425 [1936]).

<sup>16</sup> *Lommen v. Minneapolis Gaslight Co.*, 65 Minn. 196, 68 N. W. 53 (1896).

<sup>17</sup> *Winters v. Minneapolis & St. L. R. R.*, 128 Minn. 260, 148 N. W. 106 (1914); *Bombolis v. Minneapolis & St. L. R. R.*, 128 Minn. 112, 150 N. W. 385 (1914).

<sup>18</sup> *Franklin v. St. Louis & M. R. R.*, 188 Mo. 533, 87 S. W. 930 (1905).

<sup>19</sup> *Garbert v. Chicago, R. I. & P. Ry.*, 171 Mo. 84, 70 S. W. 891 (1902).

<sup>20</sup> *Idaho: State v. Jutila et al.*, 34 Idaho 595, 202 Pac. 566 (1921). *Louisiana: State v. Sinegal*, 51 La. Ann. 932, 25 So. 957 (1899); *State v. Wooten*, 136 La. 560, 67 So. 366 (1915). *Mississippi: Ulmer v. Pistole*, 115 Miss. 485, 76 So. 522 (1917). *Ohio: R. A. Elder & Co. v. Shoffstal et al.*, 90 Ohio State 265, 107 N. E. 539 (1914). *Oklahoma: Oligschlager v. Stephenson*, 24 Okla. 760, 104 Pac. 345 (1909); *Muldrow v. State*, 4 Okla. Cr. 324, 111 Pac. 656 (1910); *Shafer v. State, Green v. State*, 50 Okla. Cr. 598, 115 Pac. 379 (1911). *South Dakota: Weaver v. Cuff*, 52 S. D. 51, 216 N. W. 600 (1927); *State v. Cummins*, 56 S. D. 439, 229 N. W. 302 (1930). *Texas: Bowen v. Davis*, 48 Tex. 101.

<sup>21</sup> LEGISLATIVE DOCUMENT (1936) No. 48, p. 6.

in nature—that is, that in any case at any time, a verdict of five-sixths of the jurors would be deemed conclusive. This might very easily result in the failure of many juries to give due consideration to the matters submitted to them for determination. In view of the long established sanctity of the unanimous verdict,<sup>22</sup> any change made is bound to be a radical departure from the old order, and in fairness and justice, should be less drastic than such an out-and-out alteration.

A compromise procedure that has been suggested<sup>23</sup> is that a verdict should not be received within a certain number of hours of deliberation unless it is unanimous; thereafter, with a lapse of time, a verdict by a number diminishing with passage of the time of deliberation should be accepted. This follows the method in use in Scotland and also in several of our own states, namely, Minnesota and Nebraska.

However, the courts are in a better position to know the needs and necessities of a particular case, and how much deliberation should be required, or indeed whether or not a less than unanimous verdict should be had at all under the circumstances of the case on trial. At present, if the jury is unable to agree upon a verdict after being kept together for such a time as is deemed reasonable by the court, they must be discharged and a new trial ordered.<sup>24</sup> This is a function peculiarly within the province of the judicial power and discretion,<sup>25</sup> and therefore this method could be amended by incorporating the new provision, and, where the jury is unable to agree upon a verdict, after what seems to the court a reasonable time, they can be recalled and instructed that a verdict concurred in by five-sixths of the members of the jury will be accepted as decisive of their findings.

Inasmuch as such matters seem to be more within the province of the courts than of the legislature, the latter body might merely pass a statute empowering the courts by rule to provide for the rendition of a verdict by the concurrence of five-sixths of the jury, declaring, of course, in this statute, that in a proper case such a verdict may be rendered. Although it is more desirable that the rules of procedure be formulated by the courts, under their rule-making power,<sup>26</sup> rather than by the legislature, it would be most satisfactory that this function be relegated to a body having this as one of its primary purposes.<sup>27</sup>

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<sup>22</sup> "The unit rule has its origin in the Dark Ages and is one of the common-law relics of barbarism and superstition". Judge Henry C. Caldwell, *A.M. L. REV.* 1904.

<sup>23</sup> Judge Irving C. Vann, before the Judiciary Committee of the Constitutional Convention of 1915.

<sup>24</sup> *N. Y. CIV. PRAC. ACT* art. 34, § 463.

<sup>25</sup> *Ingersoll v. Lansing*, 51 Hun 101, 5 N. Y. Supp. 288 (1889).

<sup>26</sup> *N. Y. JUDICIARY LAW* § 82.

<sup>27</sup> See Prashker, *The Proposed Civil Practice Law and Rules—A Comment* (1934) 8 *ST. JOHN'S L. REV.* 233.

Since this procedural change has been made possible by the vote of the people of the state, it is almost mandatory upon the legislature that they act upon this expression of opinion and enact a law which will put this new system into operation. By the adoption of one of the methods suggested, or some other workable method, there should be an amelioration of the present crowded conditions of our courts and a saving in both time and money to the litigants as well as to the courts, without sacrificing any of the substantive rights of the parties.

ALICE FRIEDMAN.