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No matter how great the fault of the lessee or how certain it is that his right of possession has ceased, Louisiana courts have consistently held that the lessor must, upon penalty of damages, resort to the machinery of the law for enforcing his rights. As for the remedies available to the lessee for interference with his possession, the Code allows diminution of rent or cancellation of the lease when the lessor is not at fault, and provides the additional remedy of damages where the lessor is in some way responsible for the disturbance.

Dan E. Melichar

JURY TRIAL IN LOUISIANA—IMPLICATIONS OF DUNCAN

Trial by jury is a familiar phrase to citizens of the United States, as it should be, since it is one of the principal guarantees of the Federal Constitution.¹ However, there has been considerable uncertainty as to just how far this guarantee applies, via due process, to state criminal trials. The latest effort of the United States Supreme Court to deal with this question comprises the subject matter of this Comment.

Before looking at the more recent development of the concept of trial by jury, it will be of benefit to glance at its evolution from its earliest origins. The predecessor of our modern trial by jury was the "inquisito," originated in the Ninth Century by Emperor Louis the Pious who ordered that, in all claims involving royal rights, the issues were to be determined by the sworn statements of persons within the district. This procedure was used in Normandy and it appeared in England after the Norman conquest as the inquisition. King Henry II converted the jury into an instrument for giving him information to decide disputes. In 1116, the institution known as the grand jury was formally established in the Assize of Clarendon, which provided that very comprehensive questions were to be addressed to juries. They were required to answer, among other things, questions concerning persons suspected of crimes. If a person was presented by a grand jury as suspect, he had to clear himself by one of three methods—trial by ordeal, wager of law, or trial by battle. Trial by ordeal was the one most frequently used. When

1. U.S. CONST. art. II, § 3: "The trial of all crimes, except in cases of impeachment, shall be by jury. . . ."

Id. amend. VI: "In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial. . . ."

the Church, in the Lateran Council of 1215, forbade the clergy from performing any of the religious ceremonies that accompanied the ordeal, a new method of determining guilt or innocence had to be found. The practice developed of selecting from the grand jury a special trial jury of twelve persons. Later the petit jury was drawn from the public at large, but the number selected remained at twelve.²

From the time of the early settlements along the eastern seaboard, which were predominantly English, this method of trial was dominant and was incorporated into the Constitution of the United States when these settlements formed the Union. However, other sections of the North American continent which later became part of the United States had a quite different system. One such area was that encompassed in the Louisiana Purchase, which was under the dominion of the civil law countries of France and Spain until bought by the United States in 1803. Although there is evidence that, until the thirteenth century, juries were used in France to gather administrative facts, the jury as a mode of judicial determination never developed as it did in England. One explanation attributes this lack of progression to the lack of centralization in government in France and the other continental countries. Because the English government was extremely powerful and centralized, the common law obtained a firm foothold before the ideas of civil and canon lawyers were able to influence the method of dispensing justice in a different direction. On the other hand, in France, the royal government had to struggle for supremacy, and the Crown, in creating a centralized government owed much to the doctrines of civil and canon law. The canon lawyers had developed an accusatorial method of justice, the acceptance of which by the government halted any further development of the "inquisito" into a jury similar to the common law one that had developed from this source.³

When the continental European countries began establishing colonies, naturally the method of criminal procedure was that of the mother country. Thus, there were no jury trials under either the French or the Spanish administration of Louisiana. The civil law of France and the Custom of Paris were adopted in Louisiana under a stipulation in Crozat's grant. An essential

2. 1 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 305 (3d ed. 1931); Comments, *Control Over the Jury Verdict in Louisiana Criminal Law*, 20 LA. L. REV. 657 (1960); 31 TUL. L. REV. 67 (1956); Note, 27 L.Q. REV. 357 (1911).

3. 1 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 305 (3d ed. 1931).

element of the government created for the colony was the Superior Council, its judicial body, which consisted of the three principal officials and two or more outstanding local residents or persons specially commissioned and sent from France. This Council had exclusive civil, criminal, and probate jurisdiction. When Governor O'Reilly took possession for Spain in 1769, he swept away French law and practice and substituted that of Spain, creating a court in which the Governor of Louisiana sat as sole judge and another which was composed of two Alcaldes who presided in association with the Governor's Assessor.⁴

After Louisiana became a possession of the United States, the people, accustomed to civil law dispensation of justice, were dissatisfied with the idea of trial by jury. Thus, the original law for the Territory of Orleans provided that trial in capital cases must be by jury, but in all other, the trial would be by jury only if either one of the parties requested it.⁵ From the Constitution of 1812 until the present time, trial by jury has not been provided for misdemeanors,⁶ and the practice of non-jury trial for misdemeanors was upheld by the United States Supreme Court in *Natal v. Louisiana*.⁷ Article 779 of the Louisiana Code of Criminal Procedure continued the rule that a defendant charged with a misdemeanor shall be tried by the court without a jury.⁸

This well-established procedure of non-jury trials for misdemeanors was challenged in *Duncan v. Louisiana*.⁹ In this case, Duncan, charged with simple battery, was denied a trial by jury,¹⁰ although he had requested one. He was sentenced to pay a fine of \$150.00 and to serve sixty days in the parish prison.

4. Dart, *The Place of the Civil Law in Louisiana*, 4 TUL. L. REV. 163 (1930).

5. Act of March 26, 1804, ch. 38 § 5, 2 Stat. 283: "In all criminal prosecutions which are capital, the trial shall be by a jury of twelve good and lawful men of the vicinage; and in all cases criminal and civil in the Superior court, the trial shall be by a jury, if either of the parties require it."

6. La. Const. art. VI (1812); La. Const. tit. VI, arts. 107, 128 (1845); La. Const. tit. VI, art. 103, 124, tit. IV, art. 28 (1852); La. Const. tit. VII, arts. 195, 133, tit. V, art. 82 (1864); La. Const. tit. I, art. 6, tit. IV, art. 87 (1868); La. Const. art. 7 (1879); La. Const. art. 9 (1898); La. Const. arts. 9, 116, 140 (1913); LA. CONST. arts. 1, 7.

7. 139 U.S. 621 (1891).

8. LA. CODE CRIM. P. art. 779: "A defendant charged with a misdemeanor shall be tried by the court without a jury."

9. 391 U.S. 145 (1968).

10. LA. R.S. 14:2 (1950): "Felony is any crime for which an offender may be sentenced to death or imprisonment at hard labor . . .

" . . .
"Misdemeanor is any crime other than a felony."

Id. 14:35: "Simple battery is a battery, without the consent of the victims, committed without a dangerous weapon. Whoever commits a simple battery shall be fined not more than three hundred dollars, or imprisoned for not more than two years, or both."

On appeal to the Supreme Court of the United States, Duncan contended that the sixth amendment right of trial by jury was applicable to the states through the due process clause of the fourteenth amendment;¹¹ thus the denial of his request for a jury trial deprived him of a right guaranteed by the United States Constitution. The Court held that the fourteenth amendment makes applicable to the states the right of trial by jury.¹² This decision was later held to apply only prospectively, not retroactively.¹³

The first ten amendments to the Constitution were early held to apply only to the Federal Government, not to the state governments.¹⁴ With the passage of the fourteenth amendment, the argument was made that the due process clause incorporated the Bill of Rights and made its provisions applicable to the states. Since 1873, the Supreme Court has rejected this theory and held that the fourteenth amendment did not incorporate the Bill of Rights,¹⁵ although some members of the Court still protest vigorously that it should be incorporated *in toto*.¹⁶

While rejecting the incorporationist theory, the Supreme Court has followed a steady selective process of extended application, which has resulted in making most of the Bill of Rights provisions applicable to the states by virtue of the fourteenth amendment.¹⁷ The question of whether a right guaranteed by the Bill of Rights is applicable to the states through the four-

11. U.S. CONST. amend. XIV: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

12. *Duncan v. Louisiana*, 391 U.S. 145 (1968).

13. *DeStefano v. Woods*, 392 U.S. 631 (1968); *Carcerano v. Gladden*, 392 U.S. 631 (1968). See *State v. Smith*, 212 So.2d 410 (La. 1968), in which the Supreme Court of Louisiana predicted the *Duncan* decision would not be held retroactive.

14. *Barron v. Baltimore*, 32 U.S. (7 Pet.) 243 (1833).

15. *Slaughterhouse Cases*, 83 U.S. (16 Wall.) 36 (1873).

16. See dissent in *Adamson v. California*, 332 U.S. 46, 68 (1946).

17. *Washington v. Texas*, 388 U.S. 14 (1967) (the right to compulsory process for obtaining witnesses); *Klopfer v. North Carolina*, 386 U.S. 213 (1967) (the right to a speedy trial); *Pointer v. Texas*, 380 U.S. 400 (1965) (the right to confrontation of witnesses); *Gideon v. Wainwright*, 372 U.S. 335 (1963); *Mapp v. Ohio*, 367 U.S. 643 (1961) (the fourth amendment rights to be free from unreasonable searches and seizures and to have excluded from criminal trials any illegally obtained evidence); *Malloy v. Hogan*, 378 U.S. 643 (1961) (the fifth amendment right against self-incrimination); *In re Oliver*, 333 U.S. 257 (1948) (the right to a public trial); *Fiske v. Kansas*, 274 U.S. 380 (1927) (the first amendment rights of speech, press, and religion); *Chicago B. & Q. R.R. v. Chicago*, 166 U.S. 226 (1897) (the right to compensation for property taken by the state).

teenth amendment has been phrased in a number of ways—is it one of those “fundamental principles of liberty and justice which lie at the base of all our civil and political institutions?”¹⁸; is it “basic in our system of jurisprudence?”¹⁹ and more particularly with regard to sixth amendment rights—is it “a fundamental right, essential to a fair trial?”²⁰ The affirmative answer given to this last question in the *Duncan* case is a complete departure from the position taken by the United States Supreme Court as recently as 1937 when it was stated in *Palko v. Connecticut*:

“The right to trial by jury and the immunity from prosecution except as the result of an indictment may have value and importance. Even so, they are not of the very essence of a scheme of ordered liberty. . . . Few would be so narrow or provincial as to maintain that a fair and enlightened system of justice would be impossible without them.”²¹

This was a reiteration of the position consistently followed by the Court since the earliest case in which the issue was discussed.²²

The Court justified its reversal in attitude by two distinct arguments. The first explained that statements contained in earlier cases to the effect that jury trial was not required were dicta. The Court pointed out that in none of these was the right to jury trial in serious criminal cases at issue.²³ Since there was not a holding squarely on this point in the history of the Court's decisions, the decision in *Duncan* is not overturning a precedent, but simply rejecting dicta. This argument is an accurate one; although it is the opinion of the writer that if this issue had been presented earlier, the Court would have held jury trial not required, because of the clear attitude of the earlier

18. *Hebert v. Louisiana*, 272 U.S. 312, 316 (1926).

19. *In re Oliver*, 336 U.S. 257, 273 (1948).

20. *Pointer v. Texas*, 380 U.S. 400, 403 (1965); *Gideon v. Wainwright*, 372 U.S. 335, 343-44 (1963).

21. *Palko v. Connecticut*, 302 U.S. 319, 325 (1937).

22. *Snyder v. Massachusetts*, 291 U.S. 97 (1934); *Maxwell v. Dow*, 176 U.S. 581 (1899); *Missouri v. Lewis*, 101 U.S. 22 (1879); *Walker v. Sauvinet*, 92 U.S. 90 (1875).

23. In *Walker v. Sauvinet*, 92 U.S. 90 (1875), the right to jury trial in civil cases was the issue decided. *Maxwell v. Dow*, 176 U.S. 581 (1899) held only that the fourteenth amendment did not prevent a state from trying a defendant for a non-capital offense with fewer than 12 men on the jury. The Court states in *Duncan v. Louisiana*, 391 U.S. 145, 155 (1968): “In neither *Palko* nor *Snyder* was jury trial actually at issue, although both cases contain important dicta asserting that the right to jury trial is essential. . . . [T]hese observations, though weighty and respectable, are nevertheless dicta. . . .”

Justices shown by this dicta. The second reason advanced to explain this contradiction is the different test that has evolved in recent years to determine what constitutes a fundamental principle of justice. The original test was an inquiry into whether the principle was considered fundamental to a civilized system of justice.²⁴ The test now is whether "a procedure is necessary to an Anglo-American regime of ordered liberty."²⁵ The Supreme Court pointed out that a system of justice which used no juries but utilized other safeguards that would serve the purposes that the jury serves in England and the United States, could be a fair and equitable one. However, in a common law system of justice which is present in every state of the United States, the criminal processes are of the sort that naturally complement jury trial, and have developed in reliance upon it. In a common law system, one of the most basic characteristics of this system, trial by jury, cannot be omitted.²⁶

The Court, though extending the right to trial by jury to the states, did not specifically provide in what type of cases this right will be required. Even in the federal courts, trial by jury is not required for all offenses, petty offenses being excepted.²⁷ The State of Louisiana claimed in the instant case that the offense for which defendant was tried by a judge without a jury was a petty offense, and thus even if the sixth amendment right was applicable to the states, the appellant was not entitled to a jury trial.²⁸ The Court decided otherwise, holding that a maximum possible penalty of two years disqualified this offense from being classified as petty.²⁹ However, other than stating a maximum possible penalty of two years was too much, no definite

24. *Hurtado v. California*, 110 U.S. 516, 531 (1883): "There is nothing in Magna Charta, rightly construed as a broad charter of public right and law, which ought to exclude the best ideas of all systems and of every age; and as it was the characteristic principle of the common law to draw its inspiration from every fountain of justice, we are not to assume that the sources of its supply have been exhausted. On the contrary, we should expect that the new and various experiences of our own situation and system will mould and shape it into new and not less useful form." *West v. Louisiana*, 194 U.S. 258, 262-63 (1903): "The state of Louisiana had the right to alter the common law at any time. . . . [T]he state is not tied down by any provision of the Federal Constitution to the practice and procedure which existed at common law."

25. *Duncan v. Louisiana*, 391 U.S. 145, 149-50 (1968).

26. *Id.*

27. *District of Columbia v. Clawans*, 300 U.S. 617 (1937); *District of Columbia v. Colts*, 282 U.S. 63 (1930); *Schick v. United States*, 195 U.S. 65 (1904); *Callan v. Wilson*, 127 U.S. 540 (1887).

28. Brief for appellee at 7-9, *Duncan v. Louisiana*, 391 U.S. 145 (1968).

29. *Duncan v. Louisiana*, 391 U.S. 145, 161-62 (1968): "It is sufficient for our purposes to hold that a crime punishable by two years in prison is based on past and contemporary standards in this country, a serious crime and not a petty offense."

guideline was given, the Court stating: "We need not settle in this case the exact location of the line between petty offenses and serious crimes."³⁰

When one looks at previous efforts of the courts to deal with this subject, the above is not an unexpected statement. The Supreme Court has held, in accordance with the general rule that provisions of the Constitution are to be interpreted according to the common law in existence at the time the Constitution was written,³¹ that petty offenses are exempt from the guarantee of a jury trial.³² But since there was no definite rule at common law as to what constituted a petty offense,³³ the federal courts had no easy task in attempting to define one.

The first case in which this issue reached the United States Supreme Court was *Callan v. Wilson*.³⁴ There the Court decided that conspiracy was not a petty offense, basing its decision on the nature of the offense. In *District of Columbia v. Colts*,³⁵ the same standard was used, and the Court, finding reckless driving would not have been considered a petty offense at common law, held it could not be tried by the court without a jury. No mention was made of the punishment for the offense in these cases, probably because in both the punishment was light.³⁶ *Schick v. United States*³⁷ set up a two-pronged test for determination of whether the offense charged was petty—the nature of

30. *Duncan v. Louisiana*, 391 U.S. 145 (1968).

31. *Ex parte Grossman*, 267 U.S. 87, 108-09 (1925): "The language of the Constitution cannot be interpreted safely except by reference to the common law and to British institutions as they were when the instrument was framed and adopted."

32. *Ex parte Quirin*, 317 U.S. 1 (1942); *Schick v. United States*, 195 U.S. 65 (1904); *Callan v. Wilson*, 127 U.S. 540 (1888).

33. Offenses that could be tried by a magistrate without a jury differed from colony to colony in kind and in amount of penalty which could be imposed. "The number of offenses comprising the group of petty offenses which did not have to be tried by jury varied in the colonies from 60 to 180." Note 18 *Geo. L.J.* 374, 376 (1930). Punishments imposed for conviction of these petty offenses including lashing, a fine, and imprisonment in a workhouse for a period of time ranging from 3 to 12 months. Frankfurter & Corcoran, *Petty Offenses and Trial by Jury*, 39 *HARV. L. REV.* 917 (1926).

34. 127 U.S. 540 (1888).

35. 282 U.S. 63, 73 (1930): "Whether a given offense is to be classed as a crime, so as to require a jury trial, or as a petty offense, triable summarily without a jury, depends primarily upon the nature of the offense."

36. *District of Columbia v. Colts*, 282 U.S. 63 (1930) (where the possible penalty was \$100.00 or 30 days in jail); *Callan v. Wilson*, 127 U.S. 540 (1888) (where the possible penalty was \$25.00 or 30 days in jail).

37. 195 U.S. 65, 68 (1904): "The nature of the offense and the amount of punishment prescribed rather than its place in the statutes determine whether it is to be classed among serious or petty offenses, whether among crimes or misdemeanors."

the offense and the amount of punishment. In December, 1930, Congress passed a law defining a petty offense:

"All offenses which may be punished by death or imprisonment for a term exceeding one year shall be deemed felonies; all other offenses shall be deemed misdemeanors: Provided, That all offenses not involving moral turpitude, the penalty for which does not exceed confinement in a common jail, without hard labor for a period of 6 months, or a fine of not more than \$500.00, or both, shall be deemed to be petty offenses."³⁸

The Supreme Court expressed approval of this limit in *District of Columbia v. Clawans*,³⁹ and in the revision of the penal code, the same line was drawn:

"Any misdemeanor, the penalty for which does not exceed imprisonment for a period of 6 months or a fine of not more than \$500.00 or both is a petty offense."⁴⁰

In this latter statute, there is no mention of the nature of the offense as a requisite for its being held petty. The sole criterion is the amount of possible punishment.

Appellee advanced the argument⁴¹ that because simple battery was petty by nature at common law, it could be tried without a jury. The Court rejected this because the second element of the test of a petty offense, the amount of punishment, had not been met satisfactorily by the State of Louisiana. The possible penalty provided for simple battery, two years imprisonment, was severe enough to remove it from the petty offense category.

The second argument⁴² set forth by appellee in an attempt to have the offense classified as petty was that since the *actual* sentence imposed was less than six months, the offense was within even the federal standard of a petty offense. This reasoning was based on the Court's holding in *Cheff v. Schnackenberg*,⁴³ where the determining feature was the actual sentence imposed. The Court disposed of this argument by saying that the offense for which Cheff was prosecuted was one for which the extent of the penalty was not stated in the statute under which he was

38. 46 Stat. 1029 (1930).

39. 300 U.S. 617 (1937). The court held that a penalty of 90 days or \$300.00 classified the offense as petty.

40. 18 U.S.C. § 1(3) (1948).

41. Brief for appellee at 7-9, *Duncan v. Louisiana*, 391 U.S. 145 (1968).

42. *Id.* at 10.

43. *Id.* at 161 n.38.

tried, but rather it was a matter to be determined by the trial judge. The actual sentence imposed was the only available criterion in such a situation. In a statute, such as the one under which appellant was tried, where a maximum possible sentence is stated, this is the determining feature.⁴⁴

Thus the *Duncan* case decided that the maximum possible sentence that may be imposed under a particular statute is determinative, and that a two-year maximum possible sentence removed the offense from the petty offense category. However, it did not answer the question of what maximum potential sentence will be the dividing line in a state proceeding. The opinion merely mentioned possible alternatives.

"In the federal system, petty offenses are defined as those punishable by no more than six months in prison and a \$500.-00 fine. In 49 of the 50 states crimes subject to trial without a jury, which occasionally include simple battery, are punishable by no more than one year in jail."⁴⁵

The Court thus implied that an offense which carried a possible one-year sentence might be considered petty, but it strongly negated this implication by adding that it only found two jurisdictions, other than Louisiana, where an offense punishable by one year could be tried without a jury—the State of New Jersey and New York City.⁴⁶

Since so few jurisdictions will be affected by requiring the states to conform to the federal standard of six months imprisonment and/or a \$500.00 fine, it seems that the reason for the Court's hesitancy in making a positive statement to this effect was simply to give these jurisdictions the opportunity to plan an adjustment to what is almost certainly forthcoming. This is in accord with the attitude of the Louisiana legislature, as evidenced by two bills passed at the 1968 session.⁴⁷ In contemplation of the federal standard being applied to the states, there were two possible ways for the State of Louisiana to adjust to the situation: (1) provide for jury trials for all offenses whose maximum possible sentence exceed the federal six month's limit or (2) lower the maximum possible misdemeanor sentences to

44. *Duncan v. Louisiana*, 391 U.S. 145 (1968).

45. *Id.* at 161.

46. *Id.* 161 n. 38.

47. LA. R.S. 14:35, 14:37, 14:39, 14:47, 14:59, 14:63.3, 14:63.4, 14:70, 14:73, 14:74, 14:79.2, 14:90, 14:91.11, 14:95, 14:100, 14:101, 14:106, 14:017, 14:110 (1950), as last revised by La. Acts 1968, No. 647; LA. CODE CRIM. P. art. 779.

meet the federal limit, so that those offenses could continue to be tried by a judge alone. The Louisiana legislature has arrived at a solution which combines these two possibilities. At the time the *Duncan* decision was rendered, there were 41 misdemeanors in the Louisiana Criminal Code⁴⁸ whose maximum possible sentences exceeded the federal standard. These were triable by a judge without a jury, according to article 779 of the Code of Criminal Procedure.⁴⁹ The legislature has lowered the maximum possible sentence of nineteen offenses to meet the federal petty offense limit.⁵⁰ The misdemeanors whose punishment continues to exceed the federal limit are to be tried by a five-man jury.⁵¹ With the short time remaining in the legislative session after *Duncan* was rendered, there was scarce opportunity to study thoroughly all of the offenses affected by the decision. Possibly more penalties may be reduced to eliminate the necessity of providing a jury trial after a complete study of the practical effect of *Duncan* is available.

Providing for trial by a five-man jury for those misdemeanors whose penalties were not reduced to conform to the federal standard would seem to be an apt solution, but time will tell if it is a complete solution. As a corollary to the decision that the sixth amendment is applicable to the states through the fourteenth, a further question arises as to whether the type of jury required in the states is the common law jury of twelve persons who must reach a unanimous verdict. This type of jury has been held to be required in the federal court system, based on the theory that the type in existence at the time the Constitution was written is the type required by that document.⁵²

48. LA. R.S. ch. 1, tit. 14 (1950).

49. See note 8 *supra*.

50. The penalty for the following offenses was changed to conform to federal petty offense standards of six months in jail and/or a \$500.00 fine: simple battery, aggravated assault, negligent injuring, defamation, criminal mischief, entry on or remaining on places after being forbidden, aiding and abetting others to enter or remain on premises where forbidden, false accounting, commercial bribery, criminal neglect of family, conceiving and giving birth to an illegitimate child, gambling, sale, exhibition, or distribution of obscenity to minors, illegal carrying of weapons, hit and run driving, desecration of graves, obscenity, vagrancy, and simple escape. See LA. R.S. 14:35, 14:37, 14:39, 14:47, 14:59, 14:63.3, 14:63.4, 14:70, 14:73, 14:74, 14:79.2, 14:90, 14:91.11, 14:95, 14:100, 14:101, 14:106, 14:107, 14:110 (1950), as revised by La. Acts 1968, No. 647.

51. LA. CODE CRIM. P. art. 779. This is the same method of trial that Article 782 provides for relative felonies: "Cases in which the punishment may be imprisonment at hard labor shall be tried by a jury composed of 5 jurors, all of whom must concur to render a verdict."

52. *Patton v. United States*, 281 U.S. 276 (1930); *Thompson v. Utah*, 170 U.S. 343, 353 (1898): "The wise men who framed the constitution of the United States and the people who approved it were of opinion that life and liberty, when

This issue was not discussed in the *Duncan* decision and a petition for rehearing which raised the question was denied.⁵³ The answer to this is of vital importance, not only to Louisiana, which provides for a nine out of twelve verdict for major felonies, and a five-man unanimous jury of trial of relative felonies and misdemeanors punishable by more than six months in prison or a fine of \$5000.00⁵⁴ but also to many common law jurisdictions which are not in accord with the federal requirements.⁵⁵

If a jury of less than twelve is provided, or a unanimous verdict is not required, common law principles do not necessarily seem to be violated, since the defendant is still being tried on the facts by a body of laymen rather than a judge. The number twelve was fixed upon in England to comprise the petit jury not because there was anything magical about this number assuring that justice would be done, but because that was the number of the presentment jury from the Hundred. Instead of using the original presentment jury, when public opinion was so strongly against it, a trial jury was formed by selecting one or

involved in a criminal prosecution, would not be adequately secured except through the unanimous verdict of twelve jurors."

53. 392 U.S. 947 (1968).

54. LA. CODE CRIM. P. art. 782: "Cases in which the punishment may be capital shall be tried by a jury of twelve jurors, all of whom must concur to render a verdict. Cases in which the punishment is necessarily at hard labor shall be tried by a jury composed of twelve jurors, nine of whom must concur to render a verdict. Cases in which the punishment may be imprisonment at hard labor, shall be tried by a jury composed of five jurors, all of whom must concur to render a verdict."

55. Less than unanimous verdict allowed. Alabama: ALA. CODE tit. 30, § 99(1). In all but capital cases, parties may agree that jury may consist of less than 12 if one or more must be discharged during trial. Missouri: MO. CONST. art. I, § 22. A two-thirds verdict is allowed in non-record courts. Montana: MONT. CONST. art. II, § 23, provides for two-thirds majority when not a felony.

Jury less than 12 allowed: Arizona: ARIZ. CONST. art. 2, § 23. Provision may be made by law for a jury of a number less than 12 in courts not of record. Colorado: COLO. CONST. art. 2, § 23. In courts not of record, jury can be less than 12 in criminal cases. Georgia: GA. CONST. § 2-5101. The right of trial by jury shall remain inviolate, but the General Assembly may prescribe any number, not less than 5 to constitute a trial, except in the Superior Court. Michigan: MICH. CONST. art. 1, § 20. Jury may be less than 12 in courts not of record. Mississippi: MISS. CODE ANN. § 1836 (1942), provides for a jury of less than 12 in justice of the peace courts. Montana: MONT. CONST. art. 1 provides for a jury of less than 12 when not a felony and provides for a 6 man jury in justice of the peace courts. Nebraska: NEB. CONST. art. 1, § 11. Jury may be less than 12 for misdemeanors. Nevada: NEV. R.S. § 186.010 (1957). In justice courts, the jury may be from 3-12. New Mexico: N.M. STAT. ANN. § 36-12-3 (1953) provides for a six man jury in justice of the peace courts. North Carolina: N.C. GEN. STAT. § 7-204 (1953) provides for six man jury in recorder's court. North Dakota: N.D. CONST. art. 1, § 7, provides less than 12 men for juries in non-record courts. South Dakota: S.D. CONST. art. VI, § 6, says legislature may provide for a jury less than 12 in courts not of record. Washington: WASH. REV. CODE ANN. § 2.36.050 (1951) provides for a six man jury in justice of the peace courts.

more jurors from each of the several presentment juries of the Hundreds, and it was but the logical consequence that this jury would be composed of the same number as had been used when the original presentment jury also tried the case.⁵⁶ Even in England, where the common law jury developed, trial may now be by a jury of less than twelve or the verdict rendered may be less than unanimous.⁵⁷ Thus these elements of a jury trial do not seem necessarily "fair and fundamental" in a common law system of justice. *Duncan* holds that a jury is required, but it does not automatically follow that a particular type of jury is necessary for the right to be effective.⁵⁸ However, if the Court decides that fair and fundamental in our common law system of justice is necessarily the common law method of criminal procedure in existence at the time the Constitution was written, the federal common law jury requirements of a twelve-man jury which must render a unanimous verdict will be imposed upon the states.

It is hoped that the United States Supreme Court will not impose a standard upon the fifty states simply because it was prevalent in the judicial systems of the thirteen colonies, or merely for the sake of uniformity. There is nothing sacramental about a twelve-man jury which renders a unanimous verdict in a common law system of justice, as evidenced by changes in trial by jury in England, and by the fact that several states, in accord with past decisions of the Court, have deviated from the practices of the states at the time the Constitution was adopted.⁵⁹ The Court should not ignore evolution in juridical concepts and turn back the clock 181 years, choosing stagnation rather than progress. The concept of "fairness" has been tempered by practicality in other decisions of the Court, an example

56. Note, 27 L.Q. REV. 357 (1911).

57. English Criminal Justice Act 1967, ch. 80, §13.1: "(1) Subject to the following provisions of this section, the verdict of a jury in criminal proceedings need not be unanimous if (a) in a case where there are not less than eleven jurors, ten of them agree on the verdict; and (b) in case where there are ten jurors, nine of them agree on the verdict; and a verdict authorized by this subsection is hereafter in this section referred to as 'a majority verdict.' (2) A court shall not accept a majority verdict of guilty unless the foreman of the jury has stated in open court the number of jurors who respectively agreed to and dissented from the verdict. (3) A court shall not accept a majority verdict unless it appears to the court that the jury have had not less than two hours for deliberation or such longer period as the court thinks reasonable having regard to the nature and complexity of the case."

58. Since the *Duncan* case was decided, the Supreme Court of Louisiana has rendered an opinion which states that in the opinion of the court, the *Duncan* decision does not necessitate a 12 man jury which renders a unanimous verdict. *State v. Schoonover*, 211 So.2d 273 (La. 1968).

59. See note 54 *supra*.

being the recent ruling that the decision in *Duncan* is not retroactive.⁶⁰ Unanimity through the imposition of a federal standard should not be required; rather the states should be allowed to develop their own jury procedures. It would be a better course to allow the concepts of practicality and evolutionary progress to prevail in this instance, rather than to force the states to conform to a historical jury pattern.

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TORT LIABILITY OF LAW ENFORCEMENT OFFICERS: STATE REMEDIES

Duty brings the law enforcement officer into touch with all levels of society. The constant contact with people and his exercise of a not infallible discretion sometimes leads to the injury of innocent people or unnecessary abuse of the guilty. This Comment will discuss only the state law although a broad federal area also exists.¹ This Comment has a dual purpose, first, to discuss the circumstances under which liability of the individual officer arises, and second, to examine the extent to which the employing agency may be found liable as a result of the torts of its policemen.²

Citizens may be injured by policemen in various ways. Primarily the injuries are caused by the use of "unreasonable force" in effecting arrest (assault and battery), the making of an improper arrest (false imprisonment, false arrest), and the commission of an unauthorized entry upon a person's lands to search, seize, or arrest (trespass). Problems also arise in connection with harms as a result of officers' negligence in failing to take

60. See note 13 *supra*.

1. 42 U.S.C. § 1983 (1964): "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceedings for redress." See also *Pierson v. Ray*, 386 U.S. 547 (1967); *Monroe v. Pape*, 365 U.S. 167 (1961).

2. One phase of liability is the issue of immunity of the individual officer. In *Loe v. Whitman*, 107 So.2d 536, 540 (La. App. 2d Cir. 1958), the court said: "[W]hen the defendant (police officer) acts outside of his strict authority he breaches the condition of his immunity and is liable to a civil action for damages to persons harmed by his improper conduct." Effectively this means the policeman has no immunity. Furthermore, even if the officer is acting on orders from his superior, he is not protected unless such orders are "found fair and reasonable on their face." *Anders v. McConnell*, 31 So.2d 237 (La. App. 2d Cir. 1957).